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THE
ONTARIO LAW REPORTS

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (APPELLATE AND HIGH
COURT DIVISIONS).

1918-1919.

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JUDGES

OF THE

SUPREME COURT OF ONTARIO

DURING THE PERIOD OF THESE REPORTS.

APPELLATE DIVISION.

First Divisional Court.

THE HON. SIR WILLIAM RALPH MEREDITH, C.J.O.

- " " JOHN JAMES MACLAREN, J.A.
- " " JAMES MAGEE, J.A.
- " " FRANK EGERTON HODGINS, J.A.
- " " WILLIAM NASSAU FERGUSON, J.A.

Second Divisional Court.

THE HON. SIR WILLIAM MULOCK, K.C.M.G., C.J.Ex.

- " " ROGER CONGER CLUTE, J.
- " " WILLIAM RENWICK RIDDELL, J.
- " " ROBERT FRANKLIN SUTHERLAND, J.
- " " HUGH THOMAS KELLY, J.

HIGH COURT DIVISION.

THE HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., President.

- " " RICHARD MARTIN MEREDITH, C.J.C.P.
- " " BYRON MOFFATT BRITTON, J.
- " " FRANCIS ROBERT LATCHFORD, J.
- " " WILLIAM EDWARD MIDDLETON, J.
- " " HAUGHTON LENNOX, J.
- " " CORNELIUS ARTHUR MASTEN, J.
- " " HUGH EDWARD ROSE, J.
- " " WILLIAM ALEXANDER LOGIE, J.

ERRATA.

Page 62, 18th line from top, for "125" read "25."

Page 76, 6th line from bottom, for "*officii*" read "*officio*."

Page 132, 20th line from top, for "*Wallace*" read "*Wallis*."

Page 221, 11th line from top, for "77" read "11."

Page 221, 13th line from top, for "*Marks*" read "*Manks*."

Page 297, 8th line from bottom, for "10" read "9."

Page 350, 8th line from bottom, for "trial" read "collision."

Page 432, 6th line from bottom, for "104" read "1041."

Page 498, 2nd line from top, for "24" read "240."

Page 514, 23rd line from bottom, after "(1915)" insert "7 O.W.N. 704, 707."

Page 521, 14th line from bottom, after "(1915)" insert "7 O.W.N. 704, at p. 707."

Page 522, 2nd line from top, for "(not yet reported)" substitute "45 D.L.R. 327."

CASES REPORTED.

A.		Co. v.	529
Anderson v. Townships of Rochester and Mersea (App. Div.).....	301	Canadian Home Circles, Order of, Grainger v. .....(Chrs.)	53
B.		Canadian Northern R.W. Co., Johnson & Carey Co. v. ....(App. Div.)	533
Bailey Cobalt Mines Lim- ited, Re, Bailey Cobalt Mines Limited v. Benson (App. Div.).....	1	Christner, Mason & Risch Limited v.	146
Baker, Susman v.	39	Cobalt, Town of, Temis- kaming Telephone Co. Limited v. ....(App. Div.)	366
Bank of Montreal v. Stair..	79	Cohoe, McCallum v.	
Bank of Ottawa v. Hamilton Stove and Heater Co.	93	.....(App. Div.)	497
Barr v. Toronto R.W. Co. and City of Toronto.	232	Connell, Jarvis v.	
Basil v. Spratt..(App. Div.)	155	.....(App. Div.)	264
Benson, Bailey Cobalt Mines Limited v. ....(App. Div.)	1	Continental Bag and Paper Co., Mills v. ....(App. Div.)	71
Black, Hubbs v. (App. Div.)	545	Copeland v. Merton. (Chrs.)	645
Boston Law Book Co. v. Canada Law Book Co. Limited.	529	Cranston, Molsons Bank v. .....(App. Div.)	58
C.		D.	
Brawley v. Toronto R.W. Co.	568	Debard, Rex v. ....(App. Div.)	427
Burlington Public School Board v. Town of Bur- lington.	561	Di Francesco, Rex v.	75
Butterworth and City of Ottawa, Re. ....(App. Div.)	84	Dominion Reduction Co. Limited, Peterson Lake Silver Cobalt Mining Co. Limited v. ....(App. Div.)	177
C.		E.	
Campbell's Case. (App. Div.)	338	East Williams, Township of, Witherspoon v.	
Canada Law Book Co. Lim- ited, Boston Law Book		.....(App. Div.)	584

Eastview, Town of, v. Roman Catholic Episco- pal Corporation of Ottawa (App. Div.) 284	Hickman v. Warman..... (App. Div.) 257
Evans, Newcombe v. (Chrs.) 628	Hoehn v. Marshall..... (App. Div.) 241
F.	Hubbs v. Black. (App. Div.) 545
Faulkner v. Faulkner..... 634	I.
Fleming v. Town of Sand- wich..... (App. Div.) 514	International Bridge and Terminal Co., Walsh v. (App. Div.) 117
Flexlume Sign Co. Limited v. Globe Securities Co. (App. Div.) 277	J.
G.	Jarvis v. Connell..... (App. Div.) 264
Gallagher v. Woodman.... (App. Div.) 98	Johnson & Carey Co. v. Can- adian Northern R.W. Co. (App. Div.) 533
Glass v. Glass, Re..... (App. Div.) 236	L.
Globe Securities Co., Flex- lume Sign Co. Limited v. (App. Div.) 277	Labute and Township of Til- bury North, Re..... (App. Div.) 522
Grainger v. Order of Can- adian Home Circles..... (Chrs.) 53	Litovitz, Re Spellman and.. 30
Grand Valley R.W. Co., Trusts and Guarantee Co. Limited v.... (App. Div.) 398	Liverpool-Manitoba Assur- ance Co., Staddon v. (App. Div.) 355
Grant v. Grant..... 143	London Free Press Printing Co., Wilson v. (App. Div.) 12
H.	Lynch-Staunton v. Somer- ville..... (App. Div.) 575
Hackam, Rex v.... (Chrs.) 224	M.
Hall Motors Limited v. F. Rogers & Co. (App. Div.) 327	McCallum v. Cohoe..... (App. Div.) 497
Hamilton Stove and Heater Co., Bank of Ottawa v... 93	McCranor, Rex v..... (App. Div.) 482
Hastie, McGlynn v.....	McCurdy v. Oak Tire and Rubber Co. Limited..... (Chrs.) 233
..... (App. Div.) 190	McCurdy v. Oak Tire and Rubber Co. Limited..... 571

McGlynn v. Hastie.....	Peterson Lake Silver Cobalt
.....(App. Div.) 190	Mining Co. Limited v.
Makepeace, Union Bank of	Dominion Reduction Co.
Canada v....(App. Div.) 202	Limited.....(App. Div.) 177
Marshall, Hoehn v.....	R.
.....(App. Div.) 241	Renaud's Application.....
Mason & Risch Limited v.	.....(Chrs.) 238
Christner..... 146	Rex v. Debard..(App. Div.) 427
Matheson v. Town of	Rex v. Di Francesco..... 75
Mitchell..... 619	Rex v. Hackam.....(Chrs.) 224
Merton, Copeland v.(Chrs.) 645	Rex v. McCranor.....
Mills v. Continental Bag and	.....(App. Div.) 482
Paper Co.....(App. Div.) 71	Rex v. Nazzareno...(Chrs.) 36
Mitchell, Town of, Matheson	Rochester and Merse a ,
v..... 619	Townships of, Anderson v.
Molsons Bank v. Cranston	.....(App. Div.) 301
.....(App. Div.) 58	Rogers (F.) & Co., Hall
N.	Motors Limited v.....
Nazzareno, Rex v...(Chrs.) 36	.....(App. Div.) 327
Newcombe v. Evans.(Chrs.) 628	Roman Catholic Episcopal
O.	Corporation of Ottawa,
Oak Tire and Rubber Co.	Town of Eastview v.....
Limited, McCurdy v.....	.....(App. Div.) 284
.....(Chrs.) 233	Roth v. South Easthope
Oak Tire and Rubber Co.	Farmers Mutual Fire In-
Limited, McCurdy v..... 571	surance Co...(App. Div.) 186
O'Dell v. Toronto R.W. Co.	S.
.....(App. Div.) 350	Sabiston, Toronto General
Ontario and Minnesota	Hospital Trustees v.....
Power Co. Limited, Smith	.....(App. Div.) 639
v.....(App. Div.) 43	Sandwich, Town of, Fleming
Ontario Temperance Act,	v.....(App. Div.) 514
Re.....(Chrs.) 238	Skene, Stoner v..... 609
Ottawa, City of, Re Butter-	Smith v. Ontario and Min-
worth and....(App. Div.) 84	nesota Power Co. Limited
P.	.....(App. Div.) 43
Perry and Sutton, Superior	Snow v. City of Toronto.... 623
Copper Co. Limited v....	Solicitors, Re...(App. Div.) 273
.....(Chrs.) 24	

Somerville, Lynch-Staunton v.....(App. Div.) 575	Toronto General Trusts Cor- poration, Stothers v.....
South Easthope Farmers Mutual Fire Insurance Co., Roth v..(App. Div.) 186	.....(App. Div.) 432
Spellman and Litovitz, Re.. 30	Toronto R.W. Co., Brawley v..... 568
Spratt, Basil v..(App. Div.) 155	Toronto R.W. Co. and City of Toronto, Re.....
Staddon v. Liverpool-Mani- toba Assurance Co.....	.....(App. Div.) 381
.....(App. Div.) 355	Toronto R.W. Co., City of Toronto v....(App. Div.) 308
Stair, Bank of Montreal v.. 79	Toronto R.W. Co., O'Dell v. .....(App. Div.) 350
Stone v. World Newspaper Co. Limited.....(Chrs.) 33	Toronto R.W. Co. and City of Toronto, Barr v..... 232
Stoner v. Skene..... 609	Trusts and Guarantee Co. Limited v. Grand Valley R.W. Co.....(App. Div.) 398
Stothers v. Toronto General Trusts Corporation.....	U.
.....(App. Div.) 432	Union Bank of Canada v. Makepeace...(App. Div.) 202
Superior Copper Co. Lim- ited v. Perry and Sutton .....(Chrs.) 24	W.
Susman v. Baker..... 39	Walsh v. International Bridge and Terminal Co. .....(App. Div.) 117
T.	Warman, Hickman v.....
Temiskaming Telephone Co. Limited v. Town of Cobalt .....(App. Div.) 366	.....(App. Div.) 257
Tilbury North, Township of, Re Labute and.....	Waterloo Local Board of Health, Re...(App. Div.) 338
.....(App. Div.) 522	Wilson v. London Free Press Printing Co...(App. Div.) 12
Toronto, City of, Snow v... 623	Witherspoon v. Township of East Williams.....
Toronto, City of, Re Tor- onto R.W. Co. and.....	.....(App. Div.) 584
.....(App. Div.) 381	Woodman, Gallagher v.....
Toronto, City of, v. Toronto R.W. Co.....(App. Div.) 308	.....(App. Div.) 98
Toronto General Hospital Trustees v. Sabiston.....	World Newspaper Co. Lim- ited, Stone v.....(Chrs.) 33
.....(App. Div.) 639	

CASES CITED

A.	NAME OF CASE.	WHERE REPORTED.	PAGE
	Abbott v. Hampden Mutual Fire Insurance Co.....	30 Me. 414.....	363
	Adams v. Angell.....	5 Ch. D. 634.....	221
	Adams v. McBeath.....	27 Can. S.C.R. 13.....	100, 116
	Ah Lee, In re.....	5 Fed. Repr. 899.....	389
	Albon v. Pyke.....	4 M. & G. 421.....	316
	Allen (David) & Sons Billposting Limited v. King.....	[1915] 2 I.R. 448.....	552
	Alliance Bank v. Broom.....	2 Dr. & Sm. 289.....	498
	Amalgamated Society of Railway Servants v. Osborne.....	[1910] A.C. 87.....	297
	Anderson v. Fitzgerald.....	4 H.L.C. 484.....	72
	Anderson v. Municipality of South Vancouver.....	45 Can. S.C.R. 425.....	517, 521
	Anglo-French Co-operative Society, In re, Ex p. Pelly.....	21 Ch. D. 492.....	2, 7
	Anning v. Anning.....	38 O.L.R. 277, 34 D.L.R. 193.....	63, 67
	Archer v. Society of the Sacred Heart of Jesus.....	9 O.L.R. 474.....	161
	Armstrong v. Lye.....	27 A.R. 287.....	208
	Arnold v. Playter.....	22 O.R. 608.....	207
	Ashbury Railway Carriage and Iron Co. v. Riche.....	L.R. 7 H.L. 653.....	286, 527
	Ashby v. Harris.....	L.R. 3 C.P. 523.....	546, 550, 551, 552, 554
	Askew v. Manning.....	38 U.C.R. 345.....	388
	Atkinson v. Newcastle Waterworks Co..	2 Ex. D. 441.....	127
	Atter v. Atkinson.....	L.R. 1 P. & D. 665.....	99
	Attorney-General v. Hughes.....	81 L.T.R. 679.....	343
	Attorney-General for Canada v. Attorneys-General for Ontario Quebec and Nova Scotia.....	[1898] A.C. 700.....	46
	Attorney-General for New South Wales v. Bertrand.....	L.R. 1 P.C. 520, 16 L.T.N.S. 752.....	20, 77
	Attorney-General for Ontario v. Attorney-General for the Dominion.....	[1896] A.C. 348.....	384
	Attorney-General of Canada v. Attorney-General of Ontario.....	[1898] A.C. 247.....	539
	Australian Newspaper Co. v. Bennett.....	[1894] A.C. 284.....	16
	Aveline v. Whisson.....	4 M. & G. 801.....	296
	Avery & Son v. Parks.....	39 O.L.R. 74.....	583
	Ayr Harbour Trustees v. Oswald.....	8 App. Cas. 623.....	286, 289
B.			
	Badenach v. Inglis.....	29 O.L.R. 165, 14 D.L.R. 109.....	99, 110
	Bainbridge v. Postmaster-General.....	[1906] 1 K.B. 178.....	161
	Baines v. Curley.....	38 O.L.R. 301, 33 D.L.R. 309.....	533, 534, 541, 542
	Baker v. Meloy.....	95 Md. 1.....	421
	Balfour v. Malcolm.....	8 Cl. & F. 485.....	316
	Ball v. Crompton Corset Co.....	11 P.R. 256.....	629, 633

NAME OF CASE.	WHERE REPORTED.	PAGE
Ball v. Tennant.....	21 A.R. 602.....	362
Banks v. Goodfellow.....	L.R. 5 Q.B. 549.....	636
Barnett v. South London Tramways Co.	18 Q.B.D. 815.....	510
Barratt v. Kearns.....	[1905] 1 K.B. 504.....	395
Barrington's Case.....	8 Co. R. 138a.....	50
Barry v. Anderson.....	18 A.R. 247..... 241, 243, 248,	253
Barry v. Butlin.....	2 Moo. P.C. 480.....	111
Barton, Township of, v. City of Hamilton ..	13 O.W.R. 1118.....	521
Bateman v. Mayor of Ashton-under-Lyne ..	3 H. & N. 323.....	296
Baudains v. Richardson.....	[1906] A.C. 169.....	99, 116
Baylis v. Lawrence.....	11 A. & E. 920.....	15
Beal v. Michigan Central R.R. Co.....	19 O.L.R. 502..... 264, 268,	486
Beamish v. Kaulbach.....	3 Can. S.C.R. 704.....	384
Becker Gray and Co. v. London Assurance Corporation.....	[1918] A.C. 101.....	187
Behn v. Burness.....	3 B. & S. 751.....	335
Bell v. Ross.....	11 A.R. 458..... 207, 210,	223
Belshaw v. Bush.....	11 C.B. 191..... 195, 196,	197
Benson v. Smith & Son.....	37 O.L.R. 257, 31 D.L.R. 416..	534
Berry v. Da Costa.....	L.R. 1 C.P. 331.....	78
Bickford v. Town of Chatham.....	16 Can. S.C.R. 235..... 619, 621	
Binks v. South Yorkshire R.W. Co. and River Dun Co.....	3 B. & S. 244.....	132
Birch v. Stephenson.....	33 O.L.R. 427, 22 D.L.R. 404..	187
Blake v. Hummell.....	51 L.T.R. 430..... 575, 579	
Blamires v. Lancashire and Yorkshire R.W. Co.....	L.R. 8 Ex. 283.....	126
Boileau v. Heath.....	[1898] 2 Ch. 301.....	177
Bolch v. Smith.....	7 H. & N. 736.....	133
Bonanza Creek Gold Mining Co. Limited v. The King.....	[1916] 1 A.C. 566..... 156, 173, 174	
Boston Law Book Co. v. Canada Law Book Co. Limited.....	43 O.L.R. 13, 233.....	529
Bottomley v. Nuttall.....	5 C.B.N.S. 122.....	195
Boulter v. Kent Justices.....	[1897] A.C. 556.....	383
Boulton and Town of Peterborough, Re ..	16 U.C.R. 380..... 84, 92	
Bourgoin v. La Compagnie du Chemin de fer de Montreal Ottawa et Occidental.....	5 App. Cas. 381.....	539
Bournemouth Commissioners v. Watts..	14 Q.B.D. 87.....	597
Bowker v. Burdekin.....	11 M. & W. 128.....	66
Boyd v. Johnston.....	19 O.R. 598.....	215
Boyse v. Rossborough.....	6 H.L.C. 2..... 99, 116	
Brawley v. United States.....	96 U.S. 168..... 39, 41	
Braybrook, Re.....	60 Sol. J. 307.....	479
Breeze v. Midland R.W. Co.....	26 Gr. 225..... 533, 535, 543	
Brenzel and Rabinovitch, Re.....	42 O.L.R. 394.....	258
Brick Presbyterian Church v. City of New York.....	5 Cowen 538.....	286
British Columbia Electric R.W. Co. Limited v. Stewart.....	[1913] A.C. 816, 14 D.L.R. 8. .	367
British Mutual Banking Co. v. Charnwood Forest R.W. Co.....	18 Q.B.D. 714.....	317
Broadfoot v. City of Fayetteville.....	32 S.E. Repr. 804.....	404
Brook v. Hook.....	L.R. 6 Ex. 89.....	512
Brookes, In re.....	[1914] 1 Ch. 558.....	480
Brooks Jenkins & Co. v. Torquay Corporation.....	[1902] 1 K.B. 601..... 597, 598	
Brown v. Coughlin.....	50 Can. S.C.R. 100, 28 D.L.R. 437.....	215
Brown v. Fisher.....	63 L.T.R. 465.....	111

NAME OF CASE.	WHERE REPORTED.	PAGE
Brown v. O'Connell.....	36 Conn. 432.....	390
Browne v. Dunn.....	6 R. 67.....	267
Bryan v. Whistler.....	8 B. & C. 288.....	545, 546, 549, 550, 551, 552
Bryant v. Herbert.....	3 C.P.D. 389.....	236, 237
Bucke, Township of, v. New Liskeard Light Heat and Power Co.....	1 O.W.N. 123.....	367
Burk v. Tunstall.....	2 B.C.R. 12.....	384
Burnes v. Pennell.....	2 H.L.C. 497.....	510
Burt v. Winona and St. Peter R.R. Co., v.....	31 Minn. 472.....	389
Burton v. Gore District Mutual Fire Insurance Co.....	12 Gr. 156.....	357
Burton v. Thompson.....	2 Burr. 664.....	21, 22
Bush v. McCormack.....	20 O.R. 497.....	20
Buxton v. North Eastern R.W. Co.....	L.R. 3 Q.B. 549.....	132
Byrne v. Londonderry Tramway Co.....	[1902] 2 I.R. 457.....	490

C.

Cairns v. Boyd.....	6 Rettie (Sess. Cas., 4th ser.) 1004.....	135
Caldwell v. Stadacona Fire and Life Insurance Co.....	11 Can. S.C.R. 212.....	356, 363
Caledonian R.W. Co. v. Mulholland....	[1898] A.C. 216.....	133
California State Bank v. Hamburg- Bremen Insurance Co.....	71 Cal. 11.....	363
Camden, Township of, and Town of Dresden, Re.....	2 O.W.R. 200.....	525, 527
Camden, Township of, v. Town of Dres- den and Township of Chatham.....	2 Cl. & Sc. 308.....	525, 527
Cameron v. Cameron.....	14 O.R. 561.....	258
Cameron v. Tome.....	64 Md. 507.....	413, 417
Camidge v. Allenby.....	6 B. & C. 373.....	190, 191, 193, 197, 199, 200, 201
Campbell v. Community General Hospital Alms-house and Seminary of Learning of Sisters of Charity Ottawa.....	20 O.L.R. 467.....	591
Campbell v. The Commonwealth.....	84 Penn. St. 187.....	496
Campbell v. The Commonwealth.....	96 Penn. St. 344.....	389
Canadian Pacific R.W. Co. v. Notre Dame de Bonsecours.....	[1899] A.C. 367.....	539
Cannon Brewery Co. v. Central Control Board (Liquor Traffic).....	[1918] 2 Ch. 101.....	50, 383
Capital and Counties Bank v. Henry....	5 C.P.D. 514.....	15, 18
Cardwell v. Cardwell.....	Unreported.....	78
Carr v. Corfield.....	20 O.R. 218.....	79, 83
Carter v. Canadian Northern R.W. Co....	23 O.L.R. 140, 24 O.L.R. 370	59, 63, 67
Cartwright v. Town of Napance.....	11 O.L.R. 69.....	84, 93
Cartwright and Town of Napance, Re....	8 O.W.R. 65.....	93
Challoner v. Township of Lobo.....	1 O.L.R. 156.....	525
Chaplin v. Public School Board of Town of Woodstock.....	16 O.R. 728.....	388
Chatfield v. Cunningham.....	23 O.R. 153.....	241, 243, 248
Cherry v. Heming.....	4 Ex. 631.....	296
Chishom v. Provincial Insurance Co....	20 U.C.C.P. 11.....	356, 364, 365
Clayton's Case.....	1 Mer. 585.....	205, 223
Clifford v. Turrell.....	1 Y. & C. Ch. 138.....	286
Clinton Thresher Co., Re.....	1 O.W.N. 445, 15 O.W.R. 318.....	535
Cohen v. Hale.....	3 Q.B.D. 371.....	195
Coll v. Toronto R.W. Co.....	25 A.R. 55.....	172

NAME OF CASE.	WHERE REPORTED.	PAGE
Collyer v. Isaacs.....	19 Ch. D. 342.....	399, 425
Colonial Investment and Loan Co. v. Grady.....	31 W.L.R. 575, 24 D.L.R. 176.....	384, 534
Colson v. Williams.....	58 L.J. Ch. 539, 61 L.T.R. 71.....	255
Commercial Bank of Tasmania v. Jones.....	[1893] A.C. 313.....	207
Commonwealth v. Downing.....	4 Gray (Mass.) 29.....	496
Commonwealth v. Steimling.....	156 Penn. St. 400.....	177
Commonwealth v. Willard.....	22 Pick. (Mass.) 476.....	496
Connree v. North American Railway Contracting Co.....	13 P.R. 433.....	282
Conway v. Canadian Pacific R.W. Co....	12 A.R. 708.....	132
Cooch v. Goodman.....	2 Q.B. 580.....	296
Cooke v. Midland Great Western Railway of Ireland.....	[1909] A.C. 229.....	120
Copartnership Farms v. Harvey-Smith....	[1918] 2 K.B. 405.....	395, 396
Corbett v. South Eastern and Chatham Railway Companies' Managing Committee.....	[1906] 2 Ch. 12.....	319
Corby v. Hill.....	4 C.B.N.S. 556.....	132
Cornwall v. Township of West Nissouri.....	25 U.C.C.P. 9.....	298
Cory Brothers & Co. Limited v. Owners of Turkish Steamship "Mecca"....	[1897] A.C. 286.....	205, 223
Crain v. Wade.....	55 Can. S.C.R. 208, 37 D.L.R. 412.....	2, 7
Crane v. Hunt.....	26 O.R. 641.....	161
Crawford v. Tilden.....	13 O.L.R. 169, 14 O.L.R. 572.....	533, 534, 535, 537, 538, 541, 542
Croft v. Town Council of Peterborough.....	5 U.C.C.P. 35, 141.....	591, 608
Currie v. Misa.....	L.R. 10 Ex. 153.....	196, 197, 201, 552

D.

Daily v. Westchester Fire Insurance Co.....	131 Mass. 173.....	363
Dalton v. Angus.....	6 App. Cas. 740.....	338, 349, 551
Damon v. Damon.....	8 Allen (Mass.) 192.....	143, 145
Dartford Union Guardians of the Poor v. Trickett.....	59 L.T.R. 754.....	296, 597
Davies v. City of Toronto.....	15 O.R. 33.....	567
Davies v. Mann.....	10 M. & W. 546.....	46
Davies and City of Toronto, Re.....	21 O.R. 243.....	623, 625, 626
Davy, In re.....	1 U.C.L.J.N.S. 213.....	578
Dawkins v. Rokeby.....	L.R. 8 Q.B. 255.....	383, 395
Dawson v. Midland R.W. Co.....	L.R. 8 Ex. 8.....	132
Deacon v. Driffl.....	4 A.R. 335.....	208, 222
Debtor, A., In re.....	[1908] 1 K.B. 344.....	197
Defries (J.) & Sons Limited, In re.....	[1909] 2 Ch. 423.....	197
Dempster v. Lewis.....	33 Can. S.C.R. 292.....	264, 268
Denison v. Woods.....	18 P.R. 328.....	282
Derby Canal Co. v. Wilmot.....	9 East 360.....	296
Dickinson v. Barrow.....	[1904] 2 Ch. 339.....	548
Dickson v. J. A. Scott Limited.....	30 Times L.R. 256.....	120
Dilke v. Douglas.....	5 A.R. 63.....	32
Dimes v. Grand Junction Canal Co.....	17 Jur. 73.....	382, 390
Dominion Bank v. Cameron.....	13 O.W.N. 420.....	62
Dover, Township of, v. Township of Chatham.....	2 Cl. & Se. 213.....	525
Downes v. Grazebrook.....	3 Mer. 200.....	248
Drhew v. Altoona City.....	121 Penn. St. 401.....	71, 73
Driscoll v. Patrick Burgh Commissioners.....	37 Se. L.R. 274.....	134
Dumphy v. Kehoe.....	21 Rev. Leg. 119.....	35

NAME OF CASE.	WHERE REPORTED.	PAGE
Dunlop Pneumatic Tyre Co. Limited v. Selfridge and Co. Limited.....	[1915] A.C. 847.....	475
Dyson v. Forster.....	[1909] A.C. 98.....	454
E.		
Eagleton's Case.....	1 Dears. 515.....	33, 35
Eastern Construction Co. Limited v. National Trust Co. Limited.....	[1914] A.C. 197, 15 D.L.R. 755.....	498, 511
Eastwood v. Ashton.....	[1913] 2 Ch. 39, [1914] 1 Ch. 68, [1915] A.C. 900.....	260
Edwards v. Blackmore.....	42 O.L.R. 105.....	156, 175
Edwards v. Mallan.....	[1908] 1 K.B. 1002.....	236, 237
Ellis v. Hills.....	67 L.T.R. 287.....	262
Empress Engineering Co., In re.....	16 Ch. D. 125.....	475
Entner v. Benneweis.....	24 O.R. 407.....	609, 611, 612, 613, 614, 618
Equity Fire Insurance Co. v. Thompson.	41 Can. S.C.R. 491.....	352
Euclid Avenue Trusts Co. v. Hohs.....	24 O.L.R. 447.....	513
Evans v. Whyte.....	5 Bing. 485.....	191, 201
Ewart v. Snyder.....	13 Gr. 55.....	33
Ewing v. Dominion Bank.....	35 Can. S.C.R. 133.....	59, 63, 70

F.

Fairweather v. McCullough.....	43 O.L.R. 299, 43 D.L.R. 525..	499
Featherston v. Hutchinson.....	1 Cro. Eliz. 199.....	297
Fenn v. Harrison.....	3 T.R. 757.....	191, 200
Fernandez, Ex p.....	10 C.B.N.S. 3.....	384
Finlayson v. Mills.....	11 Gr. 218.....	208
Firth v. Staines.....	[1897] 2 Q.B. 70.....	89
Fleming v. Eadie.....	35 Sc. L.R. 422.....	135
Fletcher, In re, Ex p. Suffolk.....	9 Morr. B.C. 8.....	83
Flexlume Sign Co. v. Globe Securities Co.	10 O.W.N. 380.....	278
Flexlume Sign Co. Limited v. Macey Sign Co. Limited.....	10 O.W.N. 305, 12 O.W.N. 89.....	278, 279, 283, 284
Flower v. Sadler.....	10 Q.B.D. 572.....	512
Forbes v. Moffatt.....	18 Ves. 384.....	208
Forrest v. Gibson.....	6 Man. R. 612.....	207
Forsdike v. Stone.....	L.R. 3 C.P. 607.....	22
Forster v. Elvet Colliery Co.....	[1908] 1 K.B. 629.....	454
Foster v. Reno.....	22 O.L.R. 413.....	591, 607
Fowler v. Sugden.....	115 L.T.R. 51, 85 L.J.K.B. 1090.....	262
Fox v. Toronto and Nipissing R.W. Co...	7 P.R. 157.....	282
Fraser v. Mutchmor.....	8 O.L.R. 613.....	258
Freeman v. Canadian Guardian Life Insurance Co.....	17 O.L.R. 296.....	197
Freeman v. Pope.....	L.R. 5 Ch. 538.....	83, 511
Frith v. Frith.....	[1906] A.C. 254.....	286
Fulton v. Andrew.....	L.R. 7 H.L. 448.....	100, 110, 111
Furnival v. Saunders, Re.....	26 U.C.R. 119.....	333
Fydeell v. Clark.....	1 Esp. 447.....	190, 193, 199, 201

G.

Gandy v. Gandy.....	30 Ch. D. 57.....	475
Ganong v. Bayley.....	17 N.B.R. 324.....	384
Gardner v. Merker.....	43 O.L.R. 411, 44 D.L.R. 217..	335
Gaulin v. City of Ottawa.....	6 O.W.N. 38.....	561, 567

NAME OF CASE.	WHERE REPORTED.	PAGE
Gaulin and City of Ottawa, Re.....	6 O.W.N. 30, 16 D.L.R. 865	561, 567
Gautret v. Egerton.....	L.R. 2 C.P. 371.....	132, 133
George and Lang, Re.....	36 O.L.R. 382, 30 D.L.R. 504	645, 647
Gibbons v. Tomlinson.....	21 O.R. 489.....	79, 83
Gibraltar Sanitary Commissioners v. Orfila.....	15 App. Cas. 400.....	126
Gibson v. West Luther.....	20 O.W.R. 405.....	523, 524, 525, 526
Gilchrist and Island, Re.....	11 O.R. 537.....	243, 253
Gillespie and City of Toronto, In re.....	19 A.R. 713.....	514, 516, 521
Goodison Thresher Co. v. Township of McNab.....	19 O.L.R. 188.....	521
Goodwin v. Coates.....	1 Moo. & Rob. 221.....	197
Gorris v. Scott.....	L.R. 9 Ex. 125.....	43, 46, 48, 117, 120, 125, 126, 131, 140, 141
Gould v. Ferguson.....	29 O.L.R. 161, 14 D.L.R. 17.....	274, 276, 575, 576, 578, 580, 582
Goy & Co. Limited, In re.....	[1900] 2 Ch. 149.....	10
Grainger v. Order of Canadian Home Circles.....	31 O.L.R. 461, 33 O.L.R. 116, 21 D.L.R. 110.....	53, 55, 57
Grand Trunk R.W. Co. v. McKay.....	34 Can. S.C.R. 81.....	131, 354
Grand Trunk R.W. Co. of Canada v. Barnett.....	[1911] A.C. 361.....	120
Grant Bulcraig & Co., In re.....	[1906] 1 Ch. 124.....	273, 274, 276
Gray v. Jones.....	Ir. Circ. R. 46.....	613
Gray v. Mathias.....	5 Ves. 286.....	299
Grayson v. Delaney.....	10 N.Z.L.R. 134.....	177
Great Western Railway and Midland Railway v. Bristol Corporation.....	87 L.J. Ch. 414.....	63, 67, 286, 297
Great Western R.W. Co. v. Fisher.....	[1905] 1 Ch. 316.....	260
Greenock Corporation v. Caledonian R.W. Co.....	[1917] A.C. 556.....	44, 45, 46, 51
Gregory v. Williams.....	3 Mer. 582.....	475
Grice v. Shaw.....	10 Hare 76.....	208
Griffin's (Cæsar) Case.....	Chase's Decisions (Johnson's Rep.) 364.....	389
Grosvenor Street Presbyterian Church v. City of Toronto.....	(Supreme Court of Canada), 5 D.L.R. 327.....	522
Groves v. Lord Wimborne.....	[1898] 2 Q.B. 402.....	127
Guardhouse v. Blackburn.....	L.R. 1 P. & D. 109.....	99
Gundry v. Sainsbury.....	[1910] 1 K.B. 645.....	282
Gundy v. Johnston.....	28 O.L.R. 121, 7 D.L.R. 300, 12 D.L.R. 71, 48 Can. S.C.R. 516, 15 D.L.R. 295.....	276
H.		
Hall v. Mayor etc. of Swansea.....	5 Q.B. 526.....	596
Hamilton v. Long.....	[1903] 2 I.R. 407, [1905] 2 I.R. 552.....	611, 612, 613, 614, 618
Harcastle v. South Yorkshire R.W. and River Dun Co.....	4 H. & N. 67.....	132
Harper v. Luffkin.....	7 B. & C. 387.....	614
Harrison v. Harrison.....	9 Price 89.....	78
Harrold v. Great Western R.W. Co.....	14 L.T.N.S. 440.....	132
Hart v. McQuesten.....	22 Gr. 133.....	208
Haven v. Grand Junction R.R. and Depot Co.....	109 Mass. 88.....	405, 413, 414, 418

NAME OF CASE.	WHERE REPORTED.	PAGE
Hay, In re, Kerr v. Stinnear.....	[1904] 1 Ch. 317.....	143, 144
Hazel v. Lund.....	25 D.L.R. 204.....	534
Henderson v. Australian Steam Navigation Co.....	25 L.T. (O.S.) 234.....	596
Hennessy v. Keating.....	[1908] 1 I.R. 43.....	490
Higgins v. Dawson.....	[1902] A.C. 1.....	145
Higgins v. Trusts Corporation of Ontario.....	30 O.R. 684, 27 A.R. 432.....	215
Hill v. Broadbent.....	25 A.R. 159.....	258
Hill v. Rice Lewis & Son Limited.....	28 O.L.R. 366, 12 D.L.R. 588.....	335
Hilliard v. Thurston.....	9 A.R. 514.....	132
Hoare and Co. Limited v. Lewisham Corporation.....	18 Times L.R. 816.....	598
Hodgins and City of Toronto, Re.....	1 O.W.N. 31.....	514, 517, 521
Hoffman v. McCloy.....	38 O.L.R. 446, 33 D.L.R. 526.....	53, 56
Hogarth v. Latham & Co.....	3 Q.B.D. 643.....	199
Holden v. Township of Yarmouth.....	5 O.L.R. 579.....	305
Hollinshead v. Hazleton.....	[1916] 1 A.C. 428.....	50
Hollister v. Stewart.....	111 N.Y. 644.....	420
Holroyd v. Marshall.....	10 H.L.C. 191, 211.....	399, 426
Home Mutual Fire Insurance Co. of Chicago v. Hauslein.....	60 Ill. 521.....	363
Hopkins v. Ware.....	L.R. 4 Ex. 268.....	196
Horsfall, In re.....	[1911] 2 Ch. 63.....	454
Hounsell v. Smyth.....	7 C.B.N.S. 731.....	132
Hovey v. Whiting.....	14 Can. S.C.R. 515.....	94, 97
Howden (Lord) v. Simpson.....	10 A. & E. 793.....	297
Huish v. Liverpool Justices.....	[1914] 1 K.B. 109.....	383
Hull Electric Co. v. Ottawa Electric Co.....	[1902] A.C. 237.....	367
Hume v. Laurel Hill Cemetery.....	142 Fed. Repr. 552.....	286
Hunt v. Wimbledon Local Board.....	4 C.P.D. 48.....	592
Huron, Corporation of, v. Armstrong.....	27 U.C.R. 533.....	66
Hurst v. Picture Theatres Limited.....	[1915] 1 K.B. 1.....	546, 547, 552, 557
Huson and Township of South Norwich, In re.....	19 A.R. 343.....	84, 91
Hutchinson v. Standard Bank of Canada.....	39 O.L.R. 286, 36 D.L.R. 378.....	498, 503, 513

I.

Indermaur v. Dames.....	L.R. 2 C.P. 311.....	133
Indianapolis, City of, v. Indianapolis Gas Light & Coke Co.....	66 Ind. 396.....	286
Ingle v. Vaughan Jenkins.....	[1900] 2 Ch. 368.....	208, 221
Inglis (John) Co. Limited and City of Toronto, In re.....	8 O.L.R. 570.....	85, 87, 88
Institute of Patent Agents v. Lockwood.....	[1894] A.C. 347.....	127
Isherwood v. Ontario and Minnesota Power Co.....	18 O.W.R. 459, 2 O.W.N. 651.....	45, 46
Isitt v. Railway Passengers Assurance Co.....	22 Q.B.D. 504.....	187

J.

Jenkins v. Great Western R.W. Co.....	[1912] 1 K.B. 525.....	135
Jenkins v. Miller, In re.....	10 P.R. 95.....	333
Jerome, In re.....	[1907] 2 Ch. 145.....	282
Johnson, Ex p.....	6 P.R. 225.....	30, 32
Johnson v. Baker.....	4 B. & Ald. 440.....	66
Johnston (R. L.), Re.....	3 O.L.R. 1.....	274, 276, 277, 575, 580

NAME OF CASE.	WHERE REPORTED.	PAGE
Johnston and Township of Tilbury East, Re.....	25 O.L.R. 242.....	523, 525, 528
Joliffe v. Baker.....	11 Q.B.D. 255.....	258
Jones and City of Ottawa, Re.....	9 O.W.R. 323.....	343
Jones v. Earl of Tankerville.....	[1909] 2 Ch. 440.....	559
Jones v. Merionethshire Permanent Benefit Building Society.....	[1891] 2 Ch. 587, [1892] 1 Ch. 173.....	512

K.

Kearslake v. Morgan.....	5 T.R. 513.....	197
Keay v. Fenwick.....	1 C.P.D. 745.....	197
Keefe v. Phoenix Insurance Co. of Hartford.....	29 O.R. 394, 26 A.R. 277, 31 Can. S.C.R. 144.....	356
Keighley Maxsted & Co. v. Durant.....	[1901] A.C. 240.....	498, 511
Kemp and City of Toronto, Re.....	7 O.W.N. 70 ¹ , 21 D.L.R. 833.....	514, 521
Kendler v. Bernstock.....	33 O.L.R. 351, 22 D.L.R. 475.....	533, 534, 537, 540, 541, 542, 543
Kenosha, City of, v. Lamson.....	9 Wallace 477.....	404, 411, 412
Kerrison v. Smith.....	[1897] 2 Q.B. 445.....	559
Ketchum v. Duncan.....	96 U.S. 659.....	404, 415, 418, 420, 421
Kidderminster, Mayor etc. of, v. Hardwick.....	L.R. 9 Ex. 13.....	597
King v. Alford.....	9 O.R. 643.....	537, 539, 544
Kingston, City of, v. Kingston Electric R.W. Co.....	25 A.R. 462.....	317, 384
Kinnaird v. Trollope.....	39 Ch. D. 636.....	223
Koop v. Smith.....	51 Can. S.C.R. 554, 25 D.L.R. 355.....	82

L.

Latch v. Furlong.....	12 Gr. 303.....	241, 243, 248
Leeds v. Amherst.....	20 Beav. 239.....	52
Leggatt v. Brown.....	29 O.R. 530, 30 O.R. 225.....	297
LeMay v. Canadian Pacific R.W. Co.....	17 A.R. 293.....	126, 131
Leslie v. Hill.....	25 O.L.R. 144.....	525
Lester v. Foxcroft.....	Colles P.C. 108.....	548
Levi v. Milne.....	4 Bing. 195, 12 J.B. Moore 418.....	22
Levy v. Moylan.....	10 C.B. 189.....	384
Lewis v. Ronald.....	26 Times L.R. 30.....	134
Leyland Shipping Co. v. Norwich Union Fire Insurance Society.....	[1918] A.C. 350.....	187
Lichfield Union Guardians v. Greene.....	1 H. & N. 884.....	200
Liquidation Estates Purchase Co. v. Willoughby.....	[1896] 1 Ch. 726, [1898] A.C. 321.....	221
Liverpool Corporation v. H. Coghill & Son Limited.....	[1918] 1 Ch. 307.....	46
Livingstone v. Western Insurance Co.....	16 Gr. 9.....	356, 357, 363, 364
Lobitos Oil Fields Limited v. Admiralty Commissioners.....	34 Times L.R. 466.....	187
Lockhart v. Hardy.....	9 Beav. 349.....	208
Lockie v. Township of North Monaghan.....	12 O.W.N. 171.....	327, 332
Lodge Holes Colliery Co. Limited v. Wednesbury Corporation.....	[1908] A.C. 323.....	309
Logan v. LeMesurier.....	6 Moore P.C. 116.....	194
London Association for Protection of Trade v. Greenlands Limited.....	[1916] 2 A.C. 15.....	156, 161, 170

NAME OF CASE.	WHERE REPORTED.	PAGE
London Freehold and Leasehold Property Co. v. Baron Suffield.....	[1897] 2 Ch. 608.....	59, 68
London, Mayor etc. of, v. Cox.....	L.R. 2 H.L. 239.....	38 ¹
Lound v. Grimwade.....	39 Ch. D. 605.....	297
Louth Rural District Council v. West....	12 Times L.R. 477.....	309
Lowe v. Adams.....	[1901] 2 Ch. 598.....	552, 558
Lumsden v. Spectator Printing Co.....	29 O.L.R. 293, 14 D.L.R. 470	551
	... 12, 13, 14, 15, 16, 17, 20, 21, 22	

M.

McBain v. Township of Cavan.....	5 O.W.N. 544.....	591
McClatchie v. Haslam.....	65 L.T.R. 691.....	499, 512
Macdonald v. Bullivant.....	10 A.R. 582.....	208
Macdonald v. Fox.....	39 O.L.R. 261, 35 D.L.R. 198..	498
McDonald v. Grand Trunk R.W. Co....	2 O.W.N. 748.....	282
McDougall v. Snider.....	29 O.L.R. 448, 15 D.L.R. 111..	45
McGough v. Lancaster Burial Board....	21 Q.B.D. 323.....	550
MacKay v. City of Toronto.....	39 O.L.R. 34, 43 O.L.R. 17, 43 D.L.R. 263, 14 O.W.N. 155..	521, 584, 585, 589, 590, 591, 592 595, 603, 604, 605
McKechnie v. McKechnie's Trustees....	[1908] Sess. Cas. 93.....	116
Mackenzie, Ex p.....	L.R. 7 Eq. 240.....	9
Mackenzie v. Maple Mountain Mining Co.	20 O.L.R. 615.....	84, 91
McKenzie v. Montreal and Ottawa R.W. Co.....	29 U.C.C.P. 333.....	399, 411
Mackie v. MacMillan.....	36 Sc. L.R. 137.....	135
McLean v. Clydesdale Banking Co.....	9 App. Cas. 95.....	198
Maclean v. Dunn.....	4 Bing. 722.....	527
McLean v. Wokes.....	7 O.W.N. 490.....	156, 161, 170
Maclean v. Segar.....	[1917] 2 K.B. 325.....	120
McLeod v. Noble.....	28 O.R. 528, 24 A.R. 459.....	453
McLeod v. Sault Ste. Marie Public School Board.....	36 O.L.R. 415, 29 D.L.R. 661..	177
McQueen v. Phoenix Mutual Fire Insur- ance Co.....	4 Can. S.C.R. 660.....	356, 361, 362, 363
Madden v. Nalson and Fort Sheppard R.W. Co.....	[1899] A.C. 626.....	534, 539
Maguire v. Liverpool Corporation.....	[1905] 1 K.B. 767.....	126
Manchester Sheffield and Lincolnshire R.W. Co. v. Wallis.....	23 L.J.C.P. 85.....	132
Manks v. Whiteley.....	[1912] 1 Ch. 735.....	221
Manley v. St. Helens Canal and R.W. Co.	2 H. & N. 840.....	121
Marsh v. Joseph.....	[1897] 1 Ch. 213.....	497, 511
Martin v. Martin.....	12 Gr. 500, 15 Gr. 586.....	116
Masters v. Ibberson.....	8 C.B. 100.....	510
Matson v. Baird & Co.....	5 Rettie (Sess. Cas., 4th ser.) 87.....	132
Matson v. Dennis.....	4 DeG. J. & S. 345.....	32
Mawson v. Hartsink.....	4 Esp. 103.....	229
Maxwell v. Deare.....	8 Moore P.C. 363.....	197, 198
Melliss v. Shirley Local Board.....	14 Q.B.D. 911, 16 Q.B.D. 446..	598
Mercantile Investment and General Trust Co. v. River Plate Trust Loan and Agency Co.....	[1894] 1 Ch. 578.....	1, 5
Mercer, Ex p.....	17 Q.B.D. 290.....	511
Merchants Life Association, Re.....	2 O.L.R. 682.....	54, 57
Mersey Docks Trustees v. Gibbs.....	11 H.L.C. 686.....	161
Metropolitan R.W. Co. v. Fowler.....	[1892] 1 Q.B. 165.....	623, 627

NAME OF CASE.	WHERE REPORTED.	PAGE
Meunier, In re.....	[1894] 2 Q.B. 415.....	494
Midland R.W. Co. v. Daykin.....	17 C.B. 126.....	132
Migner v. St. Lawrence Fire Insurance Co.	Q.R. 17 S.C. 586, 10 K.B. 122..	364
Milan Tramways Co., In re, Ex p. Theys..	22 Ch. D. 122, 25 Ch. D. 587...	2, 8, 9, 10
Miller v. Borner & Co.....	[1900] 1 Q.B. 691.....	42
Miller v. Rutland and Washington R.R. Co.....	40 Vermont 399.....	412, 413
Miller v. Tipling.....	43 O.L.R. 88, 43 D.L.R. 469...	552
Millership v. Brookes.....	5 H. & N. 797.....	68
Milligan v. Jamieson.....	4 O.L.R. 650.....	22
Miner v. Judson.....	2 Hun (N.Y.) 441.....	363
Minnesota Canal and Power Co. v. Pratt.	101 Minn. 197.....	46
Minor v. Grand Trunk R.W. Co.....	38 O.L.R. 646.....	354
Misa v. Currie.....	1 App. Cas. 554.....	196
Mitchell v. City of London Assurance Co.	15 A.R. 262.....	357, 363
Montreal, City of, v. Montreal Street R.W. Co.....	[1903] A.C. 482.....	309
Montreal Park and Island R.W. Co. v. Chateauguay and Northern R.W. Co.	35 Can. S.C.R. 48.....	289
Moreland v. Richardson.....	22 Beav. 596, 24 Beav. 33....	546, 551, 552
Morris v. Levison.....	1 C.P.D. 155.....	41
Morrow Cereal Co. v. Ogilvie Flour Mills Co.....	57 Can. S.C.R. 403.....	41
Mulliner v. Midland R.W. Co.....	11 Ch. D. 611.....	161
Mundy v. Jolliffe.....	5 My. & Cr. 167.....	548
Munro and Downey, Re.....	19 O.L.R. 249.....	384, 534
Murphy v. Corry.....	7 O.W.R. 363.....	274
Murphy v. Lamphier.....	31 O.L.R. 287.....	634, 636, 637
Murray v. Earl of Stair.....	2 B. & C. 82.....	66, 69

N.

National Bank of Australasia Limited v. J. Falkingham & Sons.....	[1902] A.C. 585.....	258
National Live Stock Insurance Co. Limited, In re.....	[1917] 1 Ch. 628.....	2, 8, 405
New Hamburg Manufacturing Co. v. Webb.....	23 O.L.R. 44.....	335
New Orleans, City of, v. St. Louis Church	11 La. Ann. R. 244.....	286
Newcombe v. Evans.....	43 O.L.R. 1.....	629
Nichols v. Marsland.....	2 Ex. D. 1.....	45
Nitro-Phosphate and Odam's Chemical Manure Co. v. London and St. Katharine Docks Co.....	9 Ch. D. 503.....	44, 52
North British R.W. Co. v. Tod.....	12 Cl. & F. 722.....	317
North Manchester Overseers v. Win- stanley.....	[1908] 1 K.B. 835.....	551
North of Scotland Mortgage Co. v. German.....	31 U.C.C.P. 349.....	208
North of Scotland Mortgage Co. v. Udell.....	46 U.C.R. 511.....	207, 211, 215

O.

Ogilvie, In the Estate of.....	[1910] P. 243.....	282
Ogilvie Flour Mills Co. Limited v. Mor- row Cereal Co.....	41 O.L.R. 58.....	41
O'Grady v. The People.....	42 Colo. 312.....	495
Okey v. Moyers.....	91 N.W. Repr. (Iowa) 771.....	72

NAME OF CASE.	WHERE REPORTED.	PAGE
Ontario and West Shore R.W. Co., Re. . .	2 O.W.N. 1041.	432, 445, 453, 459, 470, 472, 478
Oram v. Brearey.	2 Ex. D. 346.	316
Ormiston v. Great Western R.W. Co. . .	[1917] 1 K.B. 598.	167, 172
Osborne v. Amalgamated Society of Rail- way Servants.	25 Times L.R. 107.	297
Osterhout v. Fox.	14 O.L.R. 599.	333
O'Sullivan v. O'Connor.	22 L.R. Ir. 467.	135
Ottawa Electric Light Co. v. City of Ottawa.	12 O.L.R. 290.	286, 298
Ottawa Wine Vaults Co. v. McGuire. . .	27 O.L.R. 319.	79, 83

P.

Paddock v. North Eastern R.W. Co. . .	18 L.T.R. 60.	134
Page v. Cox.	10 Hare 163.	475
Palmer's Decoration and Furnishing Co., In re.	[1904] 2 Ch. 743.	10
Parfitt v. Lawless.	L.R. 2 P. & D. 462.	99, 116
Park, In re.	41 Ch. D. 326.	276
Pattle v. Hornibrook.	[1897] 1 Ch. 25.	62
Pearson's Case.	5 Ch. D. 336.	9
People, The, v. Bangs.	24 Ill. 184.	388
Peoples' Bank of Halifax v. Johnson. . .	20 Can. S.C.R. 541.	499
Perry v. Corporation of Ottawa.	23 U.C.R. 391.	596
Peters v. Jones.	[1914] 2 K.B. 781.	611
Philby v. Hazle.	8 C.B.N.S. 647, 7 Jur. N.S. 125	576, 578
Phillips v. Hatfield.	10 L.J.N.S. Ex. 33, 8 Dowl. P.C. 882.	78
Philpot v. Bath.	[1905] W.N. 114, 21 Times L.R. 634.	177
Pictou, Municipality of, v. Geldert. . . .	[1893] A.C. 524.	127
Pim v. Municipal Council of Ontario. . .	9 U.C.C.P. 302.	584, 596
Pinchin v. London and Blackwall R.W. Co.	5 DeG. M. & G. 851.	623, 626, 627
Pinhey v. Mercantile Fire Insurance Co. .	2 O.L.R. 296.	356, 364
Pitman v. Woodbury.	3 Ex. 4.	296
Polson Iron Works v. Munns.	32 W.L.R. 534, 24 D.L.R. 18	384, 534
Ponton v. City of Winnipeg.	41 Can. S.C.R. 18.	592
Pouey v. Hordern.	[1900] 1 Ch. 492.	31
Powell v. Brodhurst.	[1901] 2 Ch. 160.	32
Powell v. Fall.	5 Q.B.D. 597.	132
Power v. Banks.	[1901] 2 Ch. 487.	161
Pratt v. British Medical Association. . .	35 Times L.R. 14.	173
Pratt v. City of Stratford.	14 O.R. 260, 16 A.R. 5	591, 605, 606, 607
Price, In re, Tomlin v. Latter.	[1900] 1 Ch. 442.	31
Prison Commissioners v. Clerk of the Peace for Middlesex.	9 Q.B.D. 506.	258
Prittie and Toronto, In re.	19 A.R. 503.	623, 626
Public Works, Commissioner of (Cape Colony), v. Logan.	[1903] A.C. 355.	50
Pulsford v. Richards.	17 Beav. 87.	510
Pym v. Campbell.	6 E. & B. 370.	62

Q.

Quinn v. Leatham.	[1901] A.C. 495.	541, 542
---------------------------	--------------------------	----------

	R.		
NAME OF CASE.		WHERE REPORTED.	PAGE
Rainbow v. Juggins.....	5	Q.B.D. 422.....	221
Rainy River Boom Corporation v. Rainy Lake Lumber Co.....	27	O.L.R. 131, 6 D.L.R. 401...	46
Raleigh, Township of, and Township of Harwich, In re.....	26	A.R. 313.....	525
Ramsden v. Dyson.....	L.R. 1	H.L. 129.....	546, 560
Regina v. Baby.....	12	U.C.R. 346.....	77
Regina v. Bush.....	15	O.R. 398.....	384, 534
Regina v. Diplock.....	10	B. & S. 174, L.R. 4 Q.B. 549	388
Regina v. Dowling.....	3	Cox C.C. 509.....	483, 485
Regina v. Grimshaw.....	10	Q.B. 747.....	388
Regina v. Mullins.....	12	J.P. 776, 3 Cox C.C. 526, 7 St. Tr. N.S. 1110.....	485, 491
Regina v. Parham.....	13	Q.B. 858.....	388
Regina v. Scaife.....	17	Q.B. 238.....	77
Regina v. Smith.....	14	U.C.R. 565.....	429
Regina v. Taylor.....	11	A. & E. 949.....	388
Regina v. Walsh.....	29	O.R. 36.....	36, 38
Reid v. Reid.....	31	Ch. D. 402.....	57
Reischer v. Borwick.....	[1894]	2 Q.B. 548.....	187
Rendall v. Hayward.....	5	Bing. N.C. 424.....	22
Rex v. Baskerville.....	12	Cr. App. R. 81.....	486
Rex v. Bickley.....	73	J.P. 239.....	482, 485, 490
Rex v. Bracci.....	14	O.W.N. 305.....	37, 38
Rex v. Butterworth.....	13	O.W.N. 263.....	87
Rex v. Despard.....	28	How. St. Tr. 346.....	485, 496
Rex v. Dixon.....	3	M. & S. 11.....	510
Rex v. Hall.....	1	B. & C. 123.....	627
Rex v. Houghton-le-Spring.....	2	B. & Ald. 375.....	454
Rex v. Inhabitants of Brampton.....	10	East 282.....	429
Rex v. Inhabitants of Northwingfield.....	1	B. & Ad. 912.....	297
Rex v. Inhabitants of Oxford.....	13	East 411.....	77
Rex v. Lincolnshire Appeal Tribunal.....	[1917]	1 K.B. 1.....	91
Rex v. McDevitt.....	39	O.L.R. 138.....	84, 92
Rex v. Marshall.....	2	Chitty 370.....	388
Rex v. Mayor of Colchester.....	2	T.R. 259.....	388
Rex v. Melvin.....	38	O.L.R. 231, 34 D.L.R. 382	36, 37, 38
Rex v. Naoum.....	24	O.L.R. 306.....	431
Rex v. Noakes.....	5	C. & P. 326.....	495
Rex v. Robinson.....	[1915]	2 K.B. 342.....	33, 36
Rex v. Sandys.....	2	Barn. (K.B.) 301.....	388
Rex v. Sayer.....	5	T.R. 376 (note).....	388
Rex v. Tate.....	[1908]	2 K.B. 680.....	494
Rhodesia Goldfields Limited, In re.....	[1910]	1 Ch. 239.....	2, 7, 10
Rich v. Melanethon Board of Health.....	26	O.L.R. 48, 2 D.L.R. 866.....	621
Richardson, In re.....	3	Ch. Chrs. 144.....	274
Ricketts v. East and West India Docks etc. R.W. Co.....	12	C.B. 160.....	132
Rist v. Faux.....	4	B. & S. 409, 8 L.T.R. 737.....	614
River Wear Commissioners v. Adamson.....	2	App. Cas. 743.....	50
Robinson, Re.....	16	P.R. 423, 17 P.R. 137.....	282
Robinson v. Beaconsfield Rural District Council.....	[1911]	2 Ch. 188... 338, 341, 344, 349	
Rochester, Township of, and Township of Mersea (No. 2), In re.....	2	O.L.R. 435.....	525
Roderick v. Aston Local Board.....	5	Ch. D. 328.....	628
Rogers v. National Drug and Chemical Co.....	23	O.L.R. 234, 24 O.L.R. 486	263, 551

NAME OF CASE.	WHERE REPORTED.	PAGE
Rondot v. Monetary Times Printing Co. of Canada.....	18 P.R. 141.....	282
Rowan v. Toronto R.W. Co.....	29 Can. S.C.R. 717.....	120
Royal Aquarium and Summer and Winter Garden Society v. Parkinson.....	[1892] 1 Q.B. 431.....	383
Ruitz v. Roman Catholic Episcopal Corporation of Sandwich.....	30 U.C.R. 269.....	161
Rumball v. Wright.....	1 C. & P. 589.....	639, 641
Rushton v. Grand Trunk R.W. Co.....	6 O.L.R. 425.....	78

S.

Sachs v. Henderson.....	[1902] 1 K.B. 612.....	236, 237
Sadd v. Griffin.....	[1908] 2 K.B. 510.....	282
Salaman v. Warner.....	[1891] 1 Q.B. 734.....	282
Salomon v. Salomon & Co.....	[1897] A.C. 22.....	175
Sandwich, Town of, and Sandwich Wind-sor and Amherstburg R.W. Co., Re..	2 O.W.N. 93.....	309, 382, 384, 391
Sarnia, Township of, v. Great Western R.W. Co.....	17 U.C.R. 65.....	309
Savage v. Howard Insurance Co.....	52 N.Y. 502.....	363, 365
Saxby v. Easterbrook.....	3 C.P.D. 339.....	15
Saxton v. Beach.....	50 Mo. 488.....	89
Scammell v. Clarke.....	23 Can. S.C.R. 307.....	22
Scandinavian American National Bank v. Kneeland.....	8 W.W.R. 61.....	59, 63, 69
Schofield v. Bolton Corporation.....	26 Times L.R. 230.....	134
Sellers v. Sullivan.....	43 O.L.R. 528.....	116
Severn v. The Queen.....	2 Can. S.C.R. 70.....	382, 397
Sewall v. Brainerd, In re.....	38 Vermont 364.....	412
Shackell v. Rosier.....	2 Bing. N.C. 634.....	297
Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. Worcester Corporation.....	[1913] 1 K.B. 422.....	309
Shawinigan Hydro-Electric Co. v. Shawinigan Water and Power Co.....	45 Can. S.C.R. 585, 4 D.L.R. 502.....	591, 592, 607
Shoebottom v. Egerton.....	18 L.T.R. 889.....	121
Shrewsbury (Earl of) v. North Staffordshire R.W. Co.....	L.R. 1 Eq. 593.....	297
Shurie v. White.....	12 O.L.R. 54.....	238
Shuttleworth, Ex p.....	3 Ves. 368.....	200
Silsby v. Village of Dunnville.....	8 A.R. 524.....	592
Simonds v. Chesley.....	20 Can. S.C.R. 174.....	22
Simpson, In re.....	[1916] 1 Ch. 502.....	31
Simpson v. Lord Howden.....	9 Cl. & F. 61.....	297
Slack v. Barr.....	82 J.P. 91.....	395
Small Debts Act, In re.....	5 B.C.R. 246.....	384
Smith and Wife v. Crooker.....	23 U.C.R. 84.....	613, 617
Smith v. Buller.....	L.R. 19 Eq. 473.....	279, 282
Smith v. City of London.....	20 O.L.R. 133.....	298
Smith v. Harwood.....	17 P.R. 36.....	282
Smith's Case.....	L.R. 2 Ch. 604.....	510
Solicitor, Re.....	12 O.W.R. 1074.....	274, 282
Solicitor, Re.....	12 O.W.N. 191.....	274, 575, 576, 581, 582
Solicitors, Re.....	27 O.L.R. 147, 7 D.L.R. 323.....	274, 282
Solicitors, Re.....	2 O.W.N. 596, 18 O.W.R. 366.....	582
South Dorchester and Dereham v. Malahide.....	1 Cl. & Sc. 275.....	525

NAME OF CASE.	WHERE REPORTED.	PAGE
South-Eastern Railway and Wiffen's Contract, In re.....	76 L.J. Ch. 481.....	286
South Yorkshire Railway and River Dun Co. v. Great Northern R.W. Co....	9 Ex. 55.....	296
Spahr v. Bean.....	18 O.R. 70.....	615
Spencer v. Marriott.....	1 B. & C. 457.....	258
Spoor v. Green.....	L.R. 9 Ex. 99.....	622
Sproule v. Watson.....	23 A.R. 692.....	110
Stanley v. Western Insurance Co.....	L.R. 3 Ex. 71.....	187
Stark v. Reid.....	26 O.R. 257.....	223
State, The, v. Fullerton.....	90 Mo. App. 411.....	495
Stedman v. Gooch.....	1 Esp. 3.....	197
Steel Co. of Scotland v. Tancred Arrol & Co.....	26 Sc. L. Repr. 305.....	39, 41
Steele v. Midland R.W. Co.....	L.R. 1 Ch. 275.....	317
Stephens and Township of Moore, Re...	25 O.R. 600.....	523, 525, 528
Stevens v. Jeacocke.....	11 Q.B. 731.....	117, 126, 131
Stonehouse and Plympton, In re.....	24 A.R. 416.....	524
Sturge v. Starr.....	2 My. & K. 195.....	510
Sugden's Trusts, In re.....	[1917] 1 Ch. 511.....	454
Superior Copper Co. Limited v. Perry...	42 O.L.R. 45.....	24, 25
Swinfen v. Swinfen.....	29 Beav. 199.....	208
Sydenham Quartz Gold Mining Co. v. Ah Cheong.....	23 Vict. L.R. 441.....	177
Sydney Post Publishing Co. v. Kendall..	43 Can. S.C.R. 461.....	12, 13, 14, 15, 16, 17

T.

Taff Vale R.W. Co. v. Amalgamated Society of Railway Servants.....	[1901] A.C. 426.....	161
Talbot v. Poole.....	15 P.R. 274.....	277, 283
Taylor v. Davies.....	41 O.L.R. 403, 41 D.L.R. 510.....	207, 210, 223
Taylor v. Gage.....	30 O.L.R. 75, 16 D.L.R. 686.....	592, 605, 606
Terry v. Hutchinson.....	L.R. 3 Q.B. 599.....	612
Thompson v. Equity Fire Insurance Co.	17 O.L.R. 214, [1910] A.C. 592.....	352
Thompson v. Hickman.....	[1907] 1 Ch. 550.....	262
Thomson v. Stikeman.....	29 O.L.R. 146, 30 O.L.R. 123.....	206
Thorne v. Cann.....	[1895] A.C. 11.....	221
Tilbury East v. Romney.....	1 Cl. & Sc. 261.....	525, 527
Timmins v. Gibbins.....	18 Q.B. 722.....	199
Toomey v. London Brighton and South Coast R.W. Co.....	3 C.B.N.S. 146.....	350, 354
Toronto and Niagara Power Co. v. Town of North Toronto.....	25 O.L.R. 475, 2 D.L.R. 120, [1912] A.C. 834.....	24, 27, 28
Toronto, City of, and Grosvenor Street Presbyterian Church Trustees, Re...	41 O.L.R. 352.....	522
Toronto, City of, and Toronto and York Radial R.W. Co. and County of York, Re.....	42 O.L.R. 545.....	317
Toronto, City of, v. Gillespie.....	Coutlee's Digest, cols. 873, 874.....	514, 521
Toronto, City of, v. Toronto Railway...	16 O.L.R. 205.....	308, 312, 318, 323
Toronto General Hospital Trustees and Sabiston, Re.....	38 O.L.R. 139, 33 D.L.R. 78.....	644
Toronto R.W. Co. v. City of Toronto...	24 Can. S.C.R. 589.....	309
Trask v. Searle.....	121 Mass. 229.....	544
Trunkfield v. Proctor.....	2 O.L.R. 326.....	198

NAME OF CASE.	WHERE REPORTED.	PAGE
Trust and Loan Co. v. Ruttan.....	1 Can. S.C.R. 564.....	58, 66
Tufts v. Poness.....	32 O.R. 51.....	151
Turner v. Moon.....	[1901] 2 Ch. 825.....	260
Tyrrell v. Painton.....	[1894] P. 151.....	100, 111
Tyrrell v. Tyrrell.....	43 O.L.R. 272.....	327, 332

U.

Uffner v. Lewis.....	27 A.R. 242.....	453
Unexcelled Fire-Works Co. v. Polites....	130 Penn. St. 536.....	146, 153
Union Bank v. Munster.....	37 Ch. D. 51.....	510
Union Bank of Canada v. A. McKillop & Sons Limited.....	30 O.L.R. 87, 51 Can. S.C.R. 518, 11 D.L.R. 449, 16 D.L.R. 701.....	93, 96
Union Trust Co. v. Monticello and Port Jervis R.W. Co.....	63 N.Y. 311.. 413, 414, 417, 418, 420	

V.

Vautin, In re, Ex p. Saffery.....	[1900] 2 Q.B. 325.....	83
Venner v. Farmers' Loan and Trust Co.	90 Fed. Repr. 348.....	420
Vingoe & Davies, In re, Ex p. Viney & Norton.....	1 Mans. B.C. 416.....	83
Virginia, Commonwealth of, v. Chesapeake and Ohio Canal Co.....	32 Md. 501.....	413
Vokes Hardware Co. v. Grand Trunk R.W. Co.....	12 O.L.R. 344.....	535

W.

Wade v. Rochester German Fire Insurance Co.....	23 O.L.R. 635... 356, 361, 362, 363	
Waite v. Jones.....	1 Bing. N.C. 656.....	297
Walker v. Baird.....	[1892] A.C. 491.....	45
Walker v. Jones.....	L.R. 1 P.C. 50.....	223
Walker v. Midland R.W. Co.....	2 Times L.R. 450.....	
	117, 119, 134, 142	
Waller v. Lacy.....	1 M. & G. 54.....	276
Wallis v. Littell.....	11 C.B.N.S. 369.....	62
Walsh v. Lonsdale.....	21 Ch. D. 9.....	
	263, 551, 559, 639, 642	
Ward v. Hobbs.....	4 App. Cas. 13.....	127
Waring v. Ward.....	7 Ves. 332.....	215
Warner v. Jacob.....	20 Ch. D. 220.....	241, 243, 255
Waterloo, Town of, v. City of Berlin....	28 O.L.R. 206, 7 D.L.R. 241, 12 D.L.R. 390.....	308, 384
Waterous Engine Works Co. v. Town of Palmerston.....	19 A.R. 47, 21 Can. S.C.R. 556, 584, 590, 591, 595, 606, 607	
Waterpark v. Fennell.....	7 H.L.C. 650.....	258
Watkins v. Nash.....	L.R. 20 Eq. 262.....	59, 68, 69
Watson, In re, Ex p. Phillips.....	19 Q.B.D. 234.....	282
Watson v. Mid-Wales R.W. Co.....	L.R. 2 C.P. 593.....	9
Webb v. Hewitt.....	3 K. & J. 438.....	207
Webb v. Spicer.....	13 Q.B. 886.....	454
Wellington, Corporation of, v. Wilson...	14 U.C.C.P. 299.....	309
Western Counties Ry. Co. v. Windsor and Annapolis Ry. Co.....	7 App. Cas. 178.....	50
Wheulton v. Hardisty.....	8 E. & B. 232.....	510
Whicher v. National Trust Co.....	22 O.L.R. 460.....	480

NAME OF CASE.	WHERE REPORTED.	PAGE
White v. Grand Hotel Eastbourne Limited.....	[1913] 1 Ch. 113.....	551
Whiteley v. Delaney.....	[1914] A.C. 132.....	263
Whiteley (William) Limited v. The King.....	101 L.T.R. 741.....	499
Whitfield v. Todd.....	1 U.C.R. 223.....	609, 616
Whyddon's Case.....	Cro. Eliz. 520.....	69
Wilkinson v. Fairrie.....	1 H. & C. 633.....	120, 134
Wilkinson v. Smart.....	33 L.T.R. 573.....	276, 578
Wilkinson's Settlement, In re.....	[1917] 1 Ch. 620.....	31
Williams v. Bayley.....	L.R. 1 H.L. 200.....	512
Wills v. Carman.....	14 A.R. 656.....	14, 20
Wilson v. Botsford-Jenks Co.....	1 O.W.R. 101.....	350, 353
Wilson v. Tumman.....	6 M. & G. 236.....	527
Wilson v. Tummon.....	12 L.J.C.P. 306.....	497, 511
Wilson Sons & Co. v. Owners of the Cargo per the "Xantho".....	12 App. Cas. 503.....	187
Windsor, City of, v. Sandwich Windsor and Amherstburg Railway.....	10 O.W.N. 205.....	309
Winfield v. Fowle.....	14 O.R. 102.....	258
Winnipeg Electric R. Co. v. City of Winni- peg.....	[1917] 1 W.W.R. 9, 30 D.L.R. 159... 309, 382, 383, 384, 392, 534	
Winstanley v. North Manchester Over- seers.....	[1910] A.C. 7.....	551
Winterbottom v. Ingham.....	7 Q.B. 611.....	639, 641
Wood v. Guarantee Trust and Safe Deposit Co.....	128 U.S. 416, 9 Supreme Court Reporter 131.....	418, 421
Wood v. Haines.....	38 O.L.R. 583.....	39, 41
Wood v. Leadbitter.....	13 M. & W. 838.....	
	..... 546, 547, 552, 557, 558, 559	
Workman v. Great Northern R.W. Co..	32 L.J.Q.B. 279.....	44, 52
Wright v. City of Ottawa and Ottawa Dairy Co. Limited.....	7 O.W.N. 151, 19 D.L.R. 712..	591
Y.		
Young, Ex p., In re Kitchin.....	17 Ch. D. 668.....	5
Young and Harston's Contract, In re...	31 Ch. D. 168.....	480
Young v. Carter.....	26 O.L.R. 576, 5 D.L.R. 655...	35
Young v. McNider.....	25 Can. S.C.R. 272.....	404
Young v. Woodcock.....	5 N.B.R. 554.....	384
Young & Co. v. Corporation of Royal Leamington Spa.....	8 App. Cas. 517.....	592
Z.		
Zimmerman v. Kemp.....	30 O.R. 465.....	5

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF ONTARIO

(APPELLATE AND HIGH COURT DIVISIONS).

[APPELLATE DIVISION.]

RE BAILEY COBALT MINES LIMITED.

BAILEY COBALT MINES LIMITED v. BENSON.

1918

Oct. 25.

1919

Jan. 29.

Company—Winding-up—Claim upon Assets by Assignees of Judgment against Company—Judgment Obtained by Company against Assignor (Director) for Damages for Misfeasance—Set-off—Equity—Right to Dividend—Notice of Assignment—Bona Fides of Assignment—Superior Position of Assignees—Retention of Dividend until Amount of Judgment against Assignor Contributed.

On the 11th June, 1914, B. recovered judgment against the company for \$90,788.89. On the 26th of that month, an order was made for the winding-up of the company. On the 15th February, 1915, B. assigned his judgment to the claimants. On the 29th June, 1915, the company and the liquidator appointed in the winding-up began an action against B. and others, directors of the company, for misfeasance. On the 15th September, 1915, the plaintiffs in that action obtained a judgment against B. with a reference for the assessment of damages; and on the 14th February, 1917, the Master's report assessing the damages at \$424,560 was filed. The claimants, the assignees of B.'s judgment, sought in the winding-up to rank upon the assets of the company for the amount of the judgment; but the Master (as he stated in an interim report) refused to permit them to receive any distributive share unless and until the amount of the judgment recovered against B. had been contributed, by or on behalf of B., to the assets of the company. No oral evidence was given or tendered before the Master; the claimants put in, as proof of their claim to rank as creditors, the judgment obtained by B. and the assignment to themselves; and the liquidator, in support of the set-off or equity which he asserted, put in the judgment against B. and the Master's report made pursuant thereto:—

Held, by MASTEN, J., on appeal from the Master's interim report, that a person cannot be concluded or affected by a judgment to which he was not actually, or in consideration of law, privy; B. and his assignees were not privies within the meaning of the rule; and, even if they were, the liquidator could not assert his suggested equity because the action in which the judgment was recovered against B. was commenced after the assignment to the claimants; and, therefore, the liquidator had failed to establish, by any evidence admissible against the claimants, the facts on which to found a set-off or equity.

Mercantile Investment and General Trust Co. v. River Plate Trust Loan and Agency Co., [1894] 1 Ch. 578, 593, referred to.

(2) That no right of set-off proper ever arose: the right must be mutual; and a misfeasant cannot set off money due to him from a company against sums due for misfeasance.

1918
—
RE
BAILEY
COBALT
MINES
LIMITED.

BAILEY
COBALT
MINES
LIMITED
v.
BENSON.

In re Anglo French Co-operative Society, Ex p. Pelly (1882), 21 Ch. D. 492, and *Crain v. Wade* (1917), 55 Can. S.C.R. 208, followed.

(3) But, if the claim to rank as a creditor on the assets of the company were made by B., he would not be entitled to receive any share of the fund without paying that which he had been found liable to contribute to the fund.

In re Rhodesia Goldfields Limited, [1910] 1 Ch. 239, 246, 247, and *In re National Live Stock Insurance Co. Limited*, [1917] 1 Ch. 628, followed.

(4) Apart from statutory enactment there is nothing—and there is nothing in the Winding-up Act, R.S.C. 1906, ch. 144—to prevent a creditor assigning his claim pending the winding-up.

(5) A debtor cannot set off against the assignee of a debt due from him, any claim against the assignor which has arisen since the assignment was completed by notice to the debtor, unless such claim arises out of the same contract as that from which the debt assigned arose, and is intimately connected with it; and this rule applies to debts proved against a company and afterwards assigned, and prevents the liquidator from setting off against the assignee a claim against the assignor founded on a breach of trust.

In re Milan Tramways Co., Ex p. Theys (1882-4), 22 Ch. D. 122, 25 Ch. D. 587, followed.

Therefore, if due notice of the assignment was given to the company before the declaration of the dividend and before recovery of the judgment against B., and if the assignment of B.'s judgment was *bonâ fide*, no right of set-off and no right to retain the dividend arose.

The order of MASTEN, J., was varied upon appeal, and the case was referred back to the Master in order to have the existence and nature of B.'s indebtedness to the company in liquidation determined.

AN appeal by the Profit Sharing Construction Company Limited, claimants, from an interim report of the Master in Ordinary.

October 9. The appeal was heard by MASTEN, J., in the Weekly Court, Toronto.

R. S. Robertson, for the appellants.

William Laidlaw, K. C., for the Bailey Cobalt Mines Limited, a company in liquidation, and for the liquidator, respondents.

October 25. MASTEN, J.:—Appeal from an interim report of the Master in Ordinary, dated the 22nd December, 1917, stating that he had refused to permit the appellants to receive any distributive share of the fund arising from the assets of the Bailey Cobalt Mines Limited in liquidation, unless and until the amount of a judgment held by the Bailey Cobalt Mines Limited against one Benson, the claimants' assignor, has been contributed, by or on behalf of Benson, to the assets of the company.

The facts in brief are as follows:—

Benson and others promoted the Bailey Cobalt Mines Limited, and were the directors of the company. It is alleged that in this connection Benson was guilty of misfeasance and became liable to the company for damages.

On the ground of such misfeasance the Bailey Cobalt Mines Limited and its liquidator sued Benson, and, judgment having been entered by default, the damages were assessed by the Master at the sum of \$424,560.

Prior to this time, viz., on the 11th June, 1914, Benson, claiming to have advanced moneys to the Bailey Cobalt company, had, prior to the liquidation, brought an action against it and had recovered a judgment for \$90,788.89, which judgment was subsequently assigned to the Profit Sharing Construction Company, and it is upon the claim of that company to prove and rank in the liquidation for this judgment that the present question arises.

The decision is based on the ground that as against Benson there was a right either to set off the dividend on his claim against the judgment of \$424,560 which the Bailey Cobalt company holds against him, or, in the alternative, an equity to retain the dividend until the amount of such claim against Benson has been contributed to the fund; and on the ground that the present appellants, as assignors of Benson's claim against the Bailey Cobalt company, take the claim subject to all equities.

In this connection the dates are of importance and are as follows:—

Benson's judgment for \$90,788.89.....	11th June, 1914.
Order for winding up the Bailey Cobalt company	
.....	26th June, 1914.
Assignment of Benson's judgment to the appellants.....	
.....	15th February, 1915.
Writ by Bailey Cobalt company and liquidator, as plaintiffs, issued in action against Benson and others for misfeasance.....	29th June, 1915.
Judgment in last-named action on motion for default in defence and refer- ing to Master to assess damages.....	15th September, 1915.
Master's report on assessing dam- ages at \$424,560.....	14th February, 1917.
Master's certificate as to proceed- ings to determine certain questions first.....	3rd October, 1917.
Master's interim report now appealed from.....	22nd December, 1917.

Masten, J.

1918

RE

BAILEY
COBALT
MINES
LIMITED.

BAILEY
COBALT
MINES
LIMITED
v.

BENSON.

Masten, J.

1918

RE

BAILEY
COBALT
MINES
LIMITED.

BAILEY
COBALT
MINES
LIMITED
v.

BENSON.

No stenographic report of the proceedings in the Master's office is filed before me; all that appears, apart from the report itself, is the following note in the Master's book:—

“Mr. Laidlaw states his contention as he did before me before the unsuccessful appeal. Mr. Robertson objects to certain documents cited by Mr. Laidlaw, being proceedings in the action and in the winding-up proceedings, being received. I think, under the order of Mr. Justice Masten, the proceedings had both in the action and in the winding-up are properly put in as evidence of such proceedings, and if Mr. Robertson objects he can answer any of them as he sees fit, and that the three points of law now and formerly submitted by Mr. Laidlaw are the matter now before me. Mr. Robertson says the judgment in the action by Meredith, C.J.C.P., is not binding on his clients, and that there is and was no jurisdiction to proceed against Benson in the action, as he was outside the jurisdiction. The claim by the liquidator against Benson arises only on the report establishing a debt. It was after the assignment. Argument concluded. Report to be settled on the 22nd instant at 11 a.m.”

It does not appear from the proceedings whether any notice of the assignment from Benson to the Profit Sharing Construction Company was, or was not, given to the Bailey company or its liquidator prior to the lodging of the present proceedings, nor does it appear when the proceedings asserting this claim were begun. This point was not discussed by counsel; but, as the situation presents itself to me at the present time, I do not think that these circumstances make any difference in the result.

The first question raised by the appellants is this: Have the respondents given legal proof of facts establishing as against the appellants a set-off or an equity to prevent them ranking in the liquidation?

As I have said above, nothing appears on the record shewing what evidence was actually adduced before the Master; but I understand it to be agreed by counsel that no oral evidence was tendered; that the appellants tendered in evidence, as proof of their claim to rank as creditors, the judgment in *Benson v. Bailey Cobalt Mines Limited*, and the assignment thereof from Benson to the appellants; and the respondents tendered, in proof of the set-off or equity which they assert, the judgment which they

hold against Benson, dated the 15th September, 1915, pronounced by Meredith, C.J.C.P., and the Master's report made in pursuance of that judgment, dated the 14th February, 1917; and the matter rests on the evidence so tendered.

Upon this the Master has ruled that the judgment against Benson and the report founded thereon in the action of Benson v. Bailey Cobalt Mines Limited are, under the circumstances, admissible in evidence against the Profit Sharing Construction Company and establish the equity which the liquidator asserts.

The Profit Sharing Construction Company appeal from that ruling, relying on the maxim "*Res inter alios acta alteri nocere non debet*," and counsel refers to the discussion of that subject in Broom's Legal Maxims, 8th ed., p. 748, and, as illustrations, to the cases of *Zimmerman v. Kemp* (1899), 30 O.R. 465; *Ex p. Young*, *In re Kitchin* (1881), 17 Ch. D. 668; *Mercantile Investment and General Trust Co. v. River Plate Trust Loan and Agency Co.*, [1894] 1 Ch. 578.

I think that the rule applicable to this case is well expressed by Romer, J., in the last-mentioned case, at p. 593; where, in the course of the argument addressed to him by Cozens-Hardy, he says: "Judgment in an action between A. and B. could not *prima facie* affect C. But it does affect C. if he is privy in estate, claiming through B. The only other exception to the general law appears to be the case of an express indemnity from C. to B., and that appears to be limited to a case where the subsequent proceedings are between the person who indemnifies and the person indemnified. Is there any other exception?" To which Cozens-Hardy replies: "I do not know of any other."

In Broom's Legal Maxims, p. 748, it is said that a person cannot be affected, still less concluded, by any evidence, decree, or judgment to which he was not actually, or in consideration of law, privy.

The cases where the parties are privy within the meaning of this rule are discussed and set forth in para. 478 of the 13th volume of Halsbury's Laws of England, and I have considered the cases there set out, and am of opinion that Benson and the Profit Sharing Construction Company are not privies within the meaning of the rule; even if they were privies, I think that the liquidator is precluded from asserting the right which he here puts for-

Masten, J.

1918

RE
BAILEY
COBALT
MINES
LIMITED.

BAILEY
COBALT
MINES
LIMITED
v.
BENSON.

Masten, J.

1918

RE

BAILEY
COBALT
MINES
LIMITED.

BAILEY
COBALT
MINES
LIMITED
v.

BENSON

ward, by another rule which is summarised in the same volume of Halsbury, para. 480:—

“In order that a judgment may be conclusive against a person as privy in estate to a party litigant it is necessary to shew (apart from his taking with a notice of a *lis pendens*) that he derives title under the latter by act or operation of law subsequent to the recovery of the judgment, or at least to the commencement of the proceedings, and that the judgment was one affecting the property to which title is derived. Purchasers of land are not estopped by proceedings commenced after the purchase; and a judgment obtained against the mortgagor of land after completion of the mortgage, setting aside his purchase of the land on the ground of fraud, is not even evidence against the mortgagee who was not a party to the action.”

From the list of dates above set forth it appears that the proceedings in which the judgment has been recovered by the insolvent company and its liquidator against Benson were commenced after the purchase by the Profit Sharing Construction Company of the judgment in question.

In his reasons for judgment the learned Master says, dealing with this point: “Under the latter clause of the first paragraph of the order of the 24th January, 1917, I regard all the proceedings in the action as also in the winding-up matter, the same having been put in by Mr. Laidlaw, as properly before me and as evidence for the plaintiffs’ liquidator.”

The judgment in question was a judgment pronounced by myself when presiding at the non-jury sittings in Toronto, and the clause relied upon by the Master is as follows:—

“It is ordered that all questions and accounts arising in this action between the plaintiff and the defendant the Profit Sharing Construction Company be referred to the Master in Ordinary to be heard and determined by him in the winding-up proceedings, and as part thereof, and that in such inquiry and on the trial of such questions all proceedings heretofore taken in this action may be used and availed of in the same manner and to the same extent as though they had been taken in the winding-up proceedings.”

I do not understand that this judgment in its terms creates or was intended to create any different situation from that which would have arisen if the case had been tried out before me at the

non-jury sittings; and I am of opinion that, if it had been so tried, the judgment in default which had been already recovered in the action against Benson would not have constituted any evidence against the Profit Sharing Construction Company, but that the Profit Sharing Construction Company would have been entitled to require the plaintiffs to prove as against them, by proper evidence other than that adduced, the facts upon which they base their claim.

I am therefore of opinion that the Master in this respect has been misled, and that the respondents have failed to establish, by any evidence admissible against the appellants, the facts on which to found their claim.

The second ground of appeal is that, on the assumption that the evidence is admissible and adequately establishes the facts, yet the appellants as assignees of a chose in action stand in a better position than Benson, and against them the equity does not exist.

As regards set-off proper, I think no such right ever arose. It is a fundamental principle of the law of set-off that the right shall be mutual, and a misfeasant cannot set off money due to him from the company against sums due for misfeasance: *In re Anglo-French Co-operative Society, Ex p. Pelly* (1882), 21 Ch. D. 492. I refer also to the recent case of *Crain v. Wade* (1917), 55 Can. S.C.R. 208, 37 D.L.R. 412, as shewing the narrow character of the right of set-off which exists under the Winding-up Act. But here the right is claimed on a wider principle of equity.

In the case of *In re Rhodesia Goldfields Limited*, [1910] 1 Ch. 239, Swinfen Eady, J., at pp. 246 and 247, says:—

“Various cases on the subject of set-off were referred to in order to shew that an unliquidated demand cannot be set off against a liquidated debt, or a debt not due against one that is due; but this rule is of much wider application than the doctrine of set-off. In my judgment the rule is of general application that where an estate is being administered by the Court, or where a fund is being distributed, a party cannot take anything out of the fund until he has made good what he owes to the fund. It is immaterial whether the amount is actually ascertained or not. If it is not actually ascertained it must be ascertained in order that the rights of the parties may be adjusted, and it would be a strange travesty of equity to hold that in distributing the fund

Masten, J.

1918

RE
BAILEY
COBALT
MINES
LIMITED.

BAILEY
COBALT
MINES
LIMITED
v.
BENSON.

Masten, J.

1918

RE

BAILEY
COBALT
MINES
LIMITED.BAILEY
COBALT
MINES
LIMITED
v.

BENSON.

Partridge was entitled to be paid at once all that was due to him out of the company's money, and subsequently to find, after it had been established that he owed money to the fund, that the amount could not be recovered from him."

The most recent decision to which my attention has been directed is *In re National Live Stock Insurance Co. Limited*, [1917] 1 Ch. 628, where Astbury, J., refers to many of the earlier decisions which have consistently maintained the view above stated.

If the claim to rank as a creditor on the assets of the Bailey Cobalt company were made by Benson, it seems clear that he would not be entitled to receive any share of the fund without paying that which he has been found liable to contribute to the fund.

Then arises the question whether the transfer to the Profit Sharing Construction Company places it in a better position than its transferor with respect to this equity. In considering this question it is to be borne in mind that the assignment from Benson to the Profit Sharing Construction Company is dated the 15th February, 1915, and that the judgment of the Bailey Cobalt company, declaring Benson guilty of misfeasance, is dated the 15th September, 1915. No evidence has been brought to my attention shewing the date when the assignment from Benson to the Profit Sharing Construction Company was notified to the Bailey Cobalt company or its liquidator, nor has any question been raised or determined as to whether the assignment from Benson to the Profit Sharing Construction Company is or is not *bonâ fide*. Apart from statutory enactment, there is nothing to interfere with the right of a creditor to assign his claim pending the winding-up, and I have examined the sections of the Winding-up Act referred to by the respondents' counsel, and I can find no provision in our Winding-up Act forbidding such a transfer.

In the case of *In re Milan Tramways Co., Ex p. Theys* (1882), 22 Ch. D. 122, at pp. 125 and 126, Kay, J., said, in a case where the facts were somewhat similar to the facts of the present case (the cross-claim being for misfeasance):—

"The liquidator resists this application upon the ground that he is, as he insists, entitled to set off the £2,000, for which he has obtained an order against Mr. Hutter. But this order was not obtained until long after the assignment by Mr. Hutter to Alfred

Theys, and the notice of that assignment given to the liquidator. Assuming that what the liquidator has recovered was damages and not a debt, there was not at the date of the assignment and of the notice any right of set-off either at law or in equity.

‘Was then the £2,000 damages? It was recovered, as I understand, by a summons under sec. 165 of the Companies Act, 1862, and was, according to the order of the 28th July, 1880, ‘the nominal value of eighty-five shares in the company received by Mr. Hutter from Charles Bernard, the promoter of the company.’ The ground of the order was, I presume, that this was in the nature of a bribe which it was a misfeasance on Mr. Hutter’s part to receive. According to *Pearson’s Case* (1877), 5 Ch. D. 336, the right of the company was to elect whether they would take the shares, and their proceeds if they had increased in value, or the value of them at the time when they were presented to him. The company have elected to take the value. This was not money in his hands. I am not informed whether he ever had any of the value of these shares in the shape of money, but if he had I must suppose it was less than what the company elected to take. As they have not taken the specific shares it seems to me that the company have insisted on their right to damages or compensation, and that the £2,000 was in the strictest sense of the word damages and not a debt. If this be so, then taking the assignment to be subject to equities, it seems to me that there was no equity to which it could be made subject. This is not the case of a liability for a call made in the winding-up which, according to *Ex p. Mackenzie* (1869), L.R. 7 Eq. 240, constitutes a debt from the time of the commencement of the winding-up, but the case seems to me to fall entirely within the decision in *Watson v. Mid-Wales R.W.Co.* (1867), L.R. 2 C.P. 593, where it was held that neither at Law nor in Equity would a set-off be allowed ‘against the assignee of an equitable *chose in action* . . . of a debt arising between the original parties subsequently to the notice of assignment, out of matters not connected with the debt claimed nor in any way referring to it.’”

The decision of Kay, J., was appealed to the Court of Appeal, and the appeal came on for hearing before the Earl of Selborne, L.C., Cotton, L.J., and Fry, L.J. The report is to be found in (1884) 25 Ch. D. 587. In the course of the argument, when the

Masten, J.

1918

RE

BAILEY

COBALT

MINES

LIMITED.

BAILEY

COBALT

MINES

LIMITED

v.

BENSON.

Masten, J.

1918

RE

BAILEY
COBALT
MINES
LIMITED.BAILEY
COBALT
MINES
LIMITED
v.
BENSON.

Court seemed somewhat against him, counsel put forward the suggestion that, if there was not a right to set off the debts, there was a right to retain the dividends until the claim due the company was paid. Dealing with this question, Fry, L. J., says (p. 594):—

“Then, as to the claim to retain the dividends, the appellant forgets that the dividend was not declared till after the order for payment of the £2,000, and that the order for that payment was not made till after the assignment of the debts to Theys. We cannot hold that the fact of Hutter having once been the owner of these debts created an inchoate equity to set off whatever might be found due from him against the dividends to become payable in respect of these debts. No right to retain the dividends could arise unless at the time when they were declared they belonged to a person who was indebted to the company.”

The rule deduced from this line of decisions is summarised in Lindley on Companies, 6th ed., p. 1027, as follows:—

“As regards debts which have been assigned, it is settled that a debtor cannot set off against the assignee of a debt due from him, any claim against the assignor which has arisen since the assignment was completed by notice to the debtor, unless such claim arises out of the same contract as that from which the debt assigned arose, and is intimately connected with it. This rule applies to debts proved against a company and afterwards assigned, and prevents the liquidator from setting off against the assignee a claim against the assignor founded on a breach of trust.”

It appears to me that I am bound to follow the express ruling of the Court of Appeal, followed as it was in *In re Goy & Co. Limited*, [1900] 2 Ch. 149; and, accordingly, with some hesitation (having regard to the language of Swinfen Eady, J., in the case of *In re Rhodesia Gold Fields Limited*, [1910] 1 Ch. at p. 247, and to the decision of Buckley, J., in *In re Palmer's Decoration and Furnishing Co.*, [1904] 2 Ch. 743), I hold that, if due notice was given to the company by the assignees, the Profit Sharing Construction Company, before the declaration of any dividend and before recovery of the judgment against Benson, and if the assignment from Benson to the Profit Sharing Construction Company is *bonâ fide*, then no right of set-off and no right to retain the dividend, as claimed, arises, but meantime and until those

questions are determined no dividend should be paid to these claimants.

In the view which I have thus expressed, I must be understood as deciding no more than the preliminary questions directly raised before the Master, and as leaving open and untouched all other issues, both those set forth in the action of Bailey Cobalt Mines Limited v. Benson and the Profit Sharing Construction Company, and all other issues, if any, relating to the rights of the appellants and respondents.

The appeal is allowed with costs, the interim report of the Master set aside, and the whole matter is referred back to him.

The Bailey Cobalt Mines Limited and the liquidator appealed from the order of MASTEN, J.

January 28 and 29, 1919. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A., and MIDDLETON, J. *H. J. Scott, K.C.*, for the appellants.

R. S. Robertson, for the Profit Sharing Construction Company, respondents.

January 29. At the conclusion of the hearing the judgment of the Court was delivered by MEREDITH, C.J.O.:—It is common ground that it is essential for the success of Mr. Scott's client that there was a debt existing anterior to the assignment by the judgment debtor, Benson, to the respondent, of Benson's judgment. We do not think that the judgment against Benson proved more than the existence of a debt at the date of the judgment, and that, we think, was not sufficient to warrant the application of the equitable rule which Mr. Scott invokes, the judgment having been recovered after the assignment to the respondent of the Benson judgment.

The proper course is, we think, not to express any opinion as to the application of the equitable rule until the nature of Benson's indebtedness has been determined, but to refer back the matter to the Master in Ordinary for determination.

Upon the reference back, the opinion expressed by Masten, J., as to the application of the rule, is not to be binding upon the Master or upon the parties.

The costs of this and of the former appeal will be reserved to be dealt with when the matter has been determined by the Master, or, in case of an appeal from his report, by the Judge who hears the appeal.

Masten, J.

1918

RE
BAILEY
COBALT
MINES
LIMITED.

BAILEY
COBALT
MINES
LIMITED.
v.
BENSON.

1918

[APPELLATE DIVISION.]

Oct. 28.

WILSON V. LONDON FREE PRESS PRINTING CO.

Libel—Question whether Words Used Defamatory—Question for Jury—Judge's Charge—Words Capable of Defamatory Meaning—General Verdict for Defendants—Libel and Slander Act, sec. 5—Trifling Damage—Interpretation of Verdict—Application for New Trial.

The plaintiff, a member of a municipal council, complained that the defendants, the publishers of a newspaper, in reporting the proceedings of the council, did not notice his presence at meetings nor refer to him by name. On one occasion it was stated in the newspaper that the persons named, not including the plaintiff, were the only members present, when in fact the plaintiff was present. The plaintiff sued for libel, alleging the defendants' publications, with the innuendo that the plaintiff was not attending to his duties as a member of the council. The trial Judge charged the jury that the words were capable of a defamatory meaning, and told the jury that it was their duty to find whether the words had in fact a defamatory meaning. He also explained to the jury the meaning of sec. 5 of the Libel and Slander Act, which provides that the jury may give a general verdict upon the whole matter in issue in the action, and shall not be required or directed to find for the plaintiff, merely on proof of publication by the defendant of the alleged libel, and of the sense ascribed to it in the action. The jury found a general verdict for the defendants:—

Held, that the jury must be taken to have found either that the words used were not libellous, or that, supposing them to be libellous, the damages were too trifling to warrant a verdict for the plaintiff; in either case, the Court should not set aside the verdict nor order a new trial.

Sydney Post Publishing Co. v. Kendall (1910), 43 Can S.C.R. 461, and *Lumsden v. Spectator Printing Co.* (1913), 29 O.L.R. 293, distinguished.

The provisions of sec. 5 of the Libel and Slander Act were first enacted by 13 & 14 Vict. ch. 60, sec. 1, were derived from Fox's Libel Act, 32 Geo.III. ch. 60 (Imp.), and were made to apply to civil actions for libel as well as to criminal proceedings.

Per RIDDELL, J.:—Even if the jury should regularly have found for the plaintiff, it was not imperative that the Court should grant a new trial; and a new trial will not be granted to enable the plaintiff to recover nominal damages.

THE following statement of the facts is taken from the judgment of CLUTE, J.:—

Appeal by the plaintiff from the judgment, dated the 8th November, 1917, directed to be entered by MIDDLETON, J., upon the findings of the jury, dismissing the plaintiff's action with costs.

At the time of the alleged libel the plaintiff was an alderman of the City of London. The defendants were the owners and publishers of a newspaper, the London Free Press.

The complaint is that the defendants systematically published false and malicious reports to the effect that the plaintiff was not attending to his duties as alderman of the City of London.

The offence consisted in the omission of the plaintiff's name from the report of the proceedings of the council. There was evidence to the effect that the plaintiff had complained that the reports given by the defendants did not do him justice, and thereupon the defendants did not report his presence or refer to him by name in the proceedings of the council. On one occasion it was stated that the persons named, not including the plaintiff, were the only aldermen present, when in fact the plaintiff was present.

The defendants do not dispute that their manager had given instructions not to refer to the plaintiff in the report of the proceedings of the council, but say that it was a mistake of the reporter in the one instance when the word "only" was used.

The jury found a general verdict for the defendants, upon which judgment was entered dismissing the plaintiff's action with costs. No objection was taken to the Judge's charge.

April 12. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

J. M. McEvoy, for the appellant. The defendants systematically published libellous reports to the effect that the appellant was negligent in his duties as alderman. The fault was one of omission, namely, that of leaving his name out of their reports of proceedings of the council. The principal publication complained of was one wherein the defendants had said that at a certain meeting "only the Board of Control and Aldermen Copp-Palmer, and Dyer were present to represent the city," whereas the appellant was also present. This publication, taken with the others, meant that the appellant was lax in the performance of his aldermanic duties; it was clearly libellous, and he was entitled to nominal damages at the least. The verdict was perverse, and there should be a new trial: *Sydney Post Publishing Co. v. Kendall* (1910), 43 Can. S.C.R. 461; *Lumsden v. Spectator Printing Co.* (1913), 29 O.L.R. 293; King's Law of Defamation, pp. 665, 666.

W. B. Raymond, for the defendants, respondents, contended that the verdict was right. It was within the province of the jury to find for the respondents, if the jurors considered that there had been no libel, or even that there had been a libel of so slight a nature that very small damages would cover the case. The learned trial Judge had rightly pointed this out in his charge, and

1918
WILSON
v.
LONDON
FREE
PRESS
PRINTING
Co.

App. Div.
1918

WILSON
v.
LONDON
FREE
PRESS
PRINTING
Co.

it was in accord with the provisions of the Libel and Slander Act, R.S.O. 1914, ch. 71, sec. 5. This statute is based on Fox's Act, which is referred to in Odgers on Libel and Slander, 4th ed., p. 772 *et seq.* Counsel contended that in any event the publication complained of was not libellous. Both the *Lumsden* and the *Sydney Post* cases were distinguishable.

McEvoy, in reply, referred to *Wills v. Carman* (1888), 14 A.R. 656.

October 28. CLUTE, J. (after stating the facts as above):— Counsel for the plaintiff argued that the publication complained of was clearly libellous upon its face; and that, while it would have been difficult to sustain a case against the defendants in respect to the publications other than the one in which the word "only" was used, that publication, taken with the others, clearly carried the meaning that the plaintiff was disregarding his duty as an alderman in not being present and taking part in the important matters that were brought before the council.

The learned trial Judge, in his charge, said, in part:—

"It is my duty to tell you whether, as a matter of law, the words are capable of having a defamatory meaning, and it is your duty to find whether the words have in fact a defamatory meaning. . . . The first article is an article that has been read to you in which it is said that only certain aldermen were present at a certain meeting, meaning thereby fairly plainly that Wilson was not there; and I think I shall come to the conclusion that that is in itself capable of being defamatory. It is a false statement, for Wilson was present at that meeting, and I think saying of an alderman that he was not present—and I think it is for you to determine whether the article means that—I only tell you it is capable of meaning that—if you come to the conclusion that that article means that Wilson was not present at that meeting, and that that is defamatory of him in his office as municipal councillor, because the faithful municipal councillor ought to be present at meetings."

After dealing with the other publications and stating that no evidence was given of special damage, he charged on the question of damages.

The statute R.S.O. 1914, ch. 71, sec. 5, provides:—

“On the trial of an action for libel the jury may give a general verdict upon the whole matter in issue in the action, and shall not be required or directed to find for the plaintiff, merely on proof of publication by the defendant of the alleged libel, and of the sense ascribed to it in the action;”

This was first enacted by 13 & 14 Vict. (1850) ch. 60, sec. 1, which was taken from Fox's Libel Act, 32 Geo. III. ch. 60 (Imp.), which applied to criminal proceedings by way of indictment or information only. When the Act was introduced into Canada, it was made to apply “to any *action*, indictment or information.”

Fox's Act “laid down no new principle; the procedure which it rendered imperative in criminal cases was already, before that enactment, the invariable rule in all civil cases, and has remained so ever since: it had, in earlier days, been the rule in criminal cases also.” “Although that Act applied more particularly to criminal cases, yet I know no distinction between the law in criminal cases and that in civil, in this respect. Therefore that which has been declared to be law in criminal cases is the law in civil cases:” *Baylis v. Lawrence* (1840), 11 A. & E. 920, at p. 925.

“Fox's Act was only declaratory of the common law:” *per* Brett, L.J., in *Capital and Counties Bank v. Henty* (1880), 5 C.P.D. 514, at p. 539.

“Libel or no libel, since Fox's Act, is of all questions peculiarly one for a jury:” *per* Lord Coleridge, C.J., in *Saxby v. Easterbrook* (1878), 3 C.P.D. 339, at p. 342.

See *Odgers on Libel and Slander*, 4th ed., pp. 575, 680, 772, and 773.

It would thus appear that our statute, at all events in so far as it refers to civil actions, was introduced into Canada as part of the common law in 1792, and in this regard the statute of 1850 above referred to was merely declaratory of the common law.

The plaintiff's counsel relied on *Sydney Post Publishing Co. v. Kendall*, 43 Can. S.C.R. 461, and *Lumsden v. Spectator Printing Co.*, 29 O.L.R. 293, 14 D.L.R. 470, urging that, inasmuch as there was proof of defamatory libel, the verdict was perverse, and there ought to be a new trial.

In the *Kendall* case a majority of the Court took the view that the verdict of the jury was clearly perverse and so unreasonable

App. Div.
1918

WILSON
v.
LONDON
FREE
PRESS
PRINTING
Co.

Clute, J.

App. Div.
1918

WILSON
v.
LONDON
FREE
PRESS
PRINTING
Co.

Clute, J.

as to lead to the conclusion that the jury had not honestly taken the facts into their consideration. Davies and Duff, JJ., dissenting, were of opinion, under the circumstances there disclosed, that it was a question for the jury to say whether a libellous construction should be put upon the publication or not; and it was for the court of appeal to say "whether the verdict found by the jury, for whose consideration it essentially was, was such as no jury could have found as reasonable men:" *Australian Newspaper Co. v. Bennett*, [1894] A.C. 284, at p. 287.

In the *Lumsden* case Meredith, C.J.O., said (p. 299), after referring to *Sydney Post Publishing Co. v. Kendall*: "I am of opinion that the words of which the appellant complained in the case at bar are not susceptible of any construction which is not defamatory."

The same cannot be said in the present case. In my opinion, quite aside from the question of damages, the jury may have taken the view that the publications in question were not in fact libellous upon the facts as proven in this case: it was solely a question for the jury, and their verdict for the defendants ought not to be disturbed.

The appeal should be dismissed with costs.

MULOCK, C.J.Ex., agreed with CLUTE, J.

RIDDELL, J.:—This is an action for libel, brought by an alderman of the City of London against a newspaper publishing company, for alleged libel contained in five (reduced by the plaintiff at the trial to four) issues of its newspaper. Questions were submitted to the jury by the learned trial Judge, my brother Middleton, as follows:—

"Do you find for the plaintiff or for the defendant? If you find for the plaintiff assess damages.

"(1) If the plaintiff can recover for publication of 9th December, 1916, \$

"(2) If the plaintiff can recover for issues of 8th December and 9th December, 1916, \$

"(3) If the plaintiff can recover for issues of 4th July, 1916, 8th November, 1916, 8th December, 1916, and 9th December, 1916, \$."

The jury returned with the answer to the first question written, "For the defendant," whereupon my learned brother said:—"Gentlemen, you find for the defendant. That saves your answering any of the other questions. You are now discharged from this case;" and he directed that judgment should be entered for the defendants, dismissing the action with costs.

The plaintiff now appeals.

The contention of the plaintiff is in substance that he was entitled to a verdict with at least nominal damages, and he relies upon *Lumsden v. Spectator Printing Co.*, 29 O.L.R. 293, 14 D.L.R. 470, and *Sydney Post Publishing Co. v. Kendall*, 43 Can. S.C.R. 461—both actions for libel.

In the former case the Chief Justice of Ontario says, at p. 299:—

"The action is one of libel, and there is no plea of justification on the record. The verdict of the jury, which was for the respondents, must, therefore, have been based on the view that the matter, the publication of which is complained of, was not a libel of the plaintiff. . . . That the plaintiff in a libel action, where the jury has found not to be libellous that which is plainly a libel, is entitled to a new trial, was decided by the Supreme Court of Canada in *Sydney Post Publishing Co. v. Kendall*, 43 Can. S.C.R. 461."

It should be observed that *Sydney Post Publishing Co. v. Kendall* was a case from Nova Scotia, which has no legislation like our R.S.O. 1914, ch. 71, sec. 5.

In the Printed Cases in the Supreme Court (in the Osgoode Hall General Library), vol. 322, the proceedings in this case are set out. At the trial Mr. Justice Longley, the presiding Judge, charged the jury, p. 14: "If you think that they (i.e., the defendants) meant, etc., etc., then I say that that article is defamatory and you are bound to find for the plaintiff. . . . In libel he has not to prove any damages." After this charge, plain, unambiguous, and unqualified, the verdict of the jury "for defendant" could mean nothing else than that the article was not a libel. There being no legislation giving any power to the jury beyond finding damages if there was a libel, the plaintiff was entitled to damages, however small, if the article was a libel, and in the opinion of the Supreme Court of Nova Scotia and the Supreme Court of Canada the article was a libel.

App. Div.

1918

WILSON

v.

LONDON

FREE

PRESS

PRINTING

Co.

Riddell, J.

Our statute, R.S.O. 1914, ch. 71, sec. 5, provides:—

“On the trial of an action for libel the jury may give a general verdict upon the whole matter in issue in the action, and shall not be required or directed to find for the plaintiff, merely on proof of publication by the defendant of the alleged libel, and of the sense ascribed to it in the action; . . .”

The terminology of this Act comes from the celebrated “Fox’s Act” (1792), 32 Geo. III. ch. 60 (Imp.), the history of which is well-known.

The Judges presiding over criminal trials, whether by way of indictment or of information, had adopted a practice of leaving to the jury only two questions: (1) that of publication, and (2) that of the sense to be ascribed to the words used; reserving to themselves the right to say what the verdict should be. This gave rise to two schools of thought: the one contending that by the common law of England it was for the jury to find the verdict in libel as in all other criminal cases; the other, that the Judges had the proper view of the common law. It was to put an end to the contention and to affirm the former view that Fox’s Act was passed. It is rather of antiquarian than practical interest to inquire which view was correct. Brett, L.J., in *Capital and Counties Bank v. Henty*, 5 C.P.D. 514 (C.A.), at p. 539, considers that the former view is sound.

Fox’s Act enacted that “on the trial of an indictment or information for the making or publishing any libel . . . the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue . . . and shall not be required . . . by the Court or Judge . . . to find the defendant or defendants guilty merely on the proof of the publication . . . and of the sense ascribed . . . in such indictment or information.” Obviously this Act applies to criminal cases only.

If this were but declaratory of the common law, the law was introduced into Canada, along with the remainder of the criminal law of England, by the Royal Proclamation of the 3rd October, 1763: Shortt & Doughty’s *Constitutional Documents, 1759-1792*; Can. Archives Report, 1905, vol. 3, p. 119 *sqq.*; the provisions of which, so far as they affect criminal law, are still in force. The Act itself was not introduced, for, though passed in the second

session of the 17th Parliament of Great Britain, which ended on the 15th June, 1792—29 Hansard 1555; Statutes at Large, 12 Runnington, 16 Ruffhead—and consequently before the first session of the Parliament of Upper Canada, which began on the 17th September, 1792, and reintroduced the English Civil Law into this part of Canada, the statute (1792) 32 Geo. III. ch. 1, sec. 3, expressly confines its effect to “matters of controversy relative to property and civil rights.”

It was (for reasons not necessary to inquire into here) thought advisable to introduce into this Province the provisions of Fox’s Act and to extend these provisions to civil cases. There is no such extension in England. Accordingly in 1850 the Parliament of Canada passed an Act (1850) 13 & 14 Vict. ch. 60, which, in sec. 1, provided:—

“It shall . . . be lawful on the trial of any action, indictment or information, for the making or publishing any libel, on the plea of not guilty pleaded, that the jury . . . may give a general verdict of guilty or not guilty upon the whole matter put in issue in such action, or upon such indictment or information, and shall not be required or directed by the Court or Judge before whom such action, indictment or information shall be tried, to find the defendant guilty merely on the proof of publication by such defendant of the paper alleged to be a libel, and of the sense attributed to the same in such action, indictment or information.”

It seems to me that, with the exceptions due to the difference between civil and criminal proceedings (one at least of them of very great importance), this Act directed that the same principles should govern in civil as in criminal proceedings for libel. As has been said, there is no corresponding statute in England, and accordingly the English cases should be read with care in their application to our law.

I can find no case in which our statute has been considered. My brother Middleton interpreted it to the jury in the present case thus:—

“Until our statute was changed, not very long ago, if a plaintiff proved a technical libel he would be entitled to recover some damage, and it was entirely for you to say how much. The amendment that was made to the statute provides that a jury, even if a technical libel has been proved, would not be required or

App. Div.
1918

WILSON
v.
LONDON
FREE
PRESS
PRINTING
Co.

Riddell, J.

App. Div.
1918

WILSON
v.
LONDON
FREE
PRESS
PRINTING
Co.

Riddell, J.

directed to find for the plaintiff merely on proving the publication by the defendant of the libel and of the disparaging sense ascribed to it. If it is a trivial matter the jury might well say, 'We are not going to sit here to give a man five cents damages, that is ridiculous, we will dismiss his action;' but, unless you take that view of the case, you will give him damages which you give as being a proper sum in your judgment for him to receive and for the defendant to pay, and it will be based partly on punishment for wrong-doing, if you think the defendant did wrong, the amount of compensation, fixing his amount of compensation as a second element that you are at liberty to take into consideration in an action for libel because it is an action based on wrong-doing as an element of punishment."

There is no case opposed to this view (unless *Lumsden v. Spectator Printing Co.* be considered such, and I think it is not). *Wills v. Carman*, 14 A.R. 656, decides that a finding of libel but no damages does not amount to a finding for the plaintiff so as to entitle him to a judgment even for nominal damages. *Bush v. McCormack* (1891), 20 O.R. 497, decides that it is not enough for the jury to find no damages, but that both parties are entitled to a finding for the plaintiff or defendant. Neither decides that, if the damages are *nil* or infinitesimal, the jury may not on that ground find a verdict for the defendant. Knowing that a plaintiff should not have a judgment unless the jury gives him damages (*Wills v. Carman*), I do not think a jury violates its duty by considering that the damages in any case would be trifling, and therefore they should not give the plaintiff a verdict at all; and refusing the plaintiff a verdict is, properly speaking, giving the defendant a verdict.

There is one very important difference between civil and criminal cases: in criminal cases, where the verdict was for the defendant, there was no power to grant a new trial (except in certain cases not of importance here): *Attorney-General for New South Wales v. Bertrand* (1867), L.R. 1 P.C. 520; but at least from 1655 the Courts exercised the power of granting new trials in civil cases: New Trial at the Common Law, 26 Yale Law Journal, p. 49 *sqq.* Fox's Act did not give the Courts power to grant a new trial in criminal cases, nor did our statutes take away the power to grant a new trial in civil cases.

No doubt the power exists in the Court to set aside a verdict for the defendant in libel, as in any other case, but such power should be prudently exercised and not except in a very plain case such as was the *Lumsden* case. It would be an extraordinary and very unfortunate result if a jury on a prosecution for criminal libel were allowed to find a verdict of not guilty, while on the very same facts under the same law in a civil case they must find a verdict against the defendant.

There is another principle, however, which I think bars the way to a new trial. The real and indeed the only complaint is that it was said by the defendants that at a certain meeting "only the Board of Control and Aldermen Copp, Palmer, and Dyer were present to represent the city . . .;" whereas the fact was that the plaintiff, also an alderman, was present as well. (Apparently the "only" was a mistake of a reporter, but that does not assist the defendants, as they did not apologise for the mistake.) The learned Judge told the jury that this was capable of a defamatory meaning, and that they should find whether it had in fact a defamatory meaning. I cannot say, as a matter of law, that saying of an alderman that he was not present with other aldermen to represent the city on a particular occasion is necessarily defamatory. I can conceive of many cases where such an absence would not be a breach of duty on the part of the alderman, and it is common knowledge that most attentive aldermen are sometimes absent from meetings. I think it cannot be that a jury is forced to find such a statement as this libellous.

Even if the jury should regularly have found for the plaintiff, it is not imperative that the Court should grant a new trial. In *Burton v. Thompson* (1758), 2 Burr. 664, in an action for libel tried before Mr. Justice Foster at *nisi prius*, that very learned Judge reported to the Court of King's Bench in Term "that the charge was proved by the plaintiff; but that the injury done to him thereby appeared upon the evidence to be so very inconsiderable, that if the jury had found for the plaintiff, he should have thought a half-crown, or even a much smaller sum, to have been sufficient damages; but that the jury had gone too far: and instead of giving the plaintiff very small damages, had found a verdict against him; which was certainly a verdict against evidence."

Lord Mansfield, C.J., said: "It does not follow by necessary

App. Div.
1918

WILSON
v.
LONDON
FREE
PRESS
PRINTING
Co.

Riddell, J.

App. Div.
1918

WILSON
v.
LONDON
FREE
PRESS
PRINTING
Co.

Riddell, J.

consequence, that there must always be a new trial granted, in all cases whatsoever, where the verdict is contrary to evidence; for it is possible that the verdict may still be on the side of the real justice and equity of the case. . . . My brother Foster, who tried the cause. . . . thinks 'half a crown or less would have been damages sufficient, if they had given their verdict for the plaintiff'. . . . I do not think that we ought to interfere merely to give the plaintiff an opportunity of harassing the defendant . . . where there has been no real damages, and where the injury is so trivial as not to deserve above a half crown compensation. . . ."

The other Judges "all spoke in very explicit terms to the same effect."

Following the practice in *Burton v. Thompson* of obtaining a report from the Judge at *nisi prius*, I have asked my brother Middleton as to the damages, and he says that they were infinitesimal; and that, had he charged the jury that they must find damages, he is confident that damages would not have exceeded 25 cents or thereabouts.

I have come to the conclusion that the verdict was "on the side of the real justice and equity of the case." It would be no kindness to the plaintiff to discuss it at length. That a new trial will not be granted to enable the plaintiff to recover nominal damages is clear from such cases as *Milligan v. Jamieson* (1902), 4 O.L.R. 650; *Simonds v. Chesley* (1891), 20 Can. S.C.R. 174; *Scammell v. Clarke* (1894), 23 Can. S.C.R. 307. Nor will a new trial be granted because the damages are too small: *Rendall v. Hayward* (1839), 5 Bing. N.C. 424; *Forsdike v. Stone* (1868), L.R. 3 C.P. 607. Of course, if the jury give a verdict from an indirect—improper—motive, e.g., to deprive the plaintiff of his costs, the verdict may be set aside: *Levi v. Milne* (1827), 4 Bing. 195, 12 J. B. Moore 418; but nothing of the kind appears here.

I would dismiss the appeal with costs.

I should perhaps have explained more clearly why, in my view, the *Lumsden* case is not opposed to the opinion above expressed.

The *Lumsden* case at most says "that the plaintiff in a libel action, where the jury has found not to be libellous that which is plainly a libel, is entitled to a new trial."

Unless I have misconceived the law, the jury here has not necessarily found that the publication was not a libel—the jury

was justified in finding a verdict for the defendants even though they thought that the publication was a libel.

SUTHERLAND, J.:—This is an action for libel. The jury, on being asked the question, "Do you find for the plaintiff or defendant?" answered, "For the defendant."

The main ground of contention on the appeal was that for the defendants to publish of the plaintiff, an alderman of the City of London, that certain aldermen "only" were present at a meeting of the city council, omitting the name of the plaintiff, who, in fact, was present, was plainly defamatory, and he was entitled to a verdict even if for nominal damages only.

The trial Judge told the jury in his charge that the statement was "capable of being defamatory," and in explaining the scope and effect of the Libel and Slander Act, R.S.O. 1914, ch. 71, sec. 7, also said to the jury:—

[The learned Judge then quoted the portion of the charge set out by RIDDELL, J., *supra*.]

It appears to me that the verdict of the jury amounts to one of two things, either that the publications were in fact not libellous or that any damage which could result therefrom was too trifling to warrant the jury in putting any money value thereon even to the extent of a nominal sum. It may not be out of place to suggest that perhaps the jury in the present case and under our statute acted upon an unexpressed but somewhat analogous view to that of the jury in a case in England of a quite different alleged defamatory libel referred to by Viscount Alverstone in his book of "Recollections of Bar and Bench" (1914), p. 51, where he says that "the jury availed themselves of a privilege given to juries under Fox's Act, and returned a verdict of 'Not guilty,' intimating that, though the letters were most scurrilous, they did not consider that they amounted to libel."

Under our statute as now framed and the direction of the Judge, which I am of opinion was a proper one, the jury was entitled upon the evidence to bring in the verdict which was rendered, and it is impossible for us to disturb it.

The appeal should be dismissed with costs.

KELLY, J., agreed with SUTHERLAND, J.

App. Div.
1918

WILSON
v.
LONDON
FREE
PRESS
PRINTING
Co.

Sutherland, J.

Appeal dismissed with costs.

1918.

[IN CHAMBERS.]

Oct. 29.

SUPERIOR COPPER CO. LIMITED v. PERRY AND SUTTON.

Writ of Summons—Foreign Defendants—Service of Notice of Writ out of Ontario—Ontario Companies Act, sec. 151, sub-secs. 6 and 7, Added by 8 Geo. V. ch. 20, sec. 30—Action by Mining Company—Enforcement of Call on Shares—“Conditions” of Service—Rules 25-30—Validity of Call—Application of New Sub-sections—Special Act, 7 Edw. VII. ch. 117—Validity of Call—General Statutory Powers—Question for Trial—Jurisdiction of Court—Leave to Enter Conditional Appearance.

The Ontario Companies Act, R.S.O. 1914, ch. 178, having been amended by sec. 30 of the Statute Law Amendment Act, 1918, 8 Geo. V. ch. 20 (assented to on the 26th March, 1918), by the addition of sub-secs. 6 and 7 to sec. 151, a former action (see *Superior Copper Co. Limited v. Perry* (1918), 42 O.L.R. 45), between the parties now before the Court in this action, was discontinued, and this action was commenced on the 31st May, 1918; the plaintiff company alleged that a call was, on the 18th October, 1917, made on the shares issued by the company, and claimed a declaration that the shares standing in the names of the defendants were not fully paid and were assessable and subject to call, that the call made was valid, and that the plaintiffs were entitled to sell the shares; they also claimed an order for the sale of the shares under the direction of the Court. Notice of the writ of summons was served upon the defendant S. out of Ontario, and he moved to set aside the service. The added sub-section 6 authorised service upon a shareholder out of the jurisdiction “in the same manner and subject to the same conditions as process is permitted to be served out of the jurisdiction in cases provided for by the Consolidated Rules:”—

Held, that each clause of Rule 25 names, not a “condition” of permitting service, but a case in which service may be allowed; the “conditions” are to be found elsewhere, e.g., in Rules 26 to 30; the sub-sections 6 and 7 of sec. 151 add a new case to the cases mentioned in Rule 25, and make the procedure laid down in the later Rules applicable to the new case.

Quære, whether the new sub-sections were applicable to the plaintiff company. *Toronto and Niagara Power Co. v. Town of North Toronto* (1912), 25 O.L.R. 475, [1912] A.C. 834, distinguished.

Held, that the question whether the call sought to be enforced was one which could be supported apart from the company's special Act, 7 Edw. VII. ch. 117 (O.), was one which could not be determined until all the facts were brought out at the trial of the action; and, therefore, the service should not be set aside; but the defendant S. should have leave to enter a conditional appearance, so that he might not be precluded from questioning, at the trial, the jurisdiction of the Court.

Although it is generally desirable that such questions should be determined at the earliest possible moment, the leave ought to be given in this particular case.

AN appeal by the defendant Sutton from an order of the Master in Chambers dismissing a motion to set aside the service of notice of the writ of summons on the appellant out of Ontario.

The appeal was heard by ROSE, J., in Chambers.

Peter White, K.C., for the appellant.

A. W. Langmuir, for the plaintiffs.

October 29. ROSE, J.:—In an action between the same parties, a Divisional Court decided in January, 1918, that leave to effect service out of Ontario could not be given in an action in which all that was claimed was a declaration that certain shares of stock were not paid-up, but were assessable and subject to call: *Superior Copper Co. Limited v. Perry*, 42 O.L.R. 45.

On the 26th March, 1918, the Royal assent was given to an amendment (8 Geo. V. ch. 20, sec. 30) to sec. 151 of the Ontario Companies Act, by which it is enacted that in the event of any call on shares of the stock of a mining company remaining unpaid for a certain length of time, the company, in lieu of proceeding to sell the shares pursuant to the provisions of sec. 151, as it stood before the amendment, may maintain in the Supreme Court an action for the sale of the shares, and may serve the process in such action upon a shareholder resident out of the jurisdiction; and also that, where any question is raised as to the validity of any call, an action may be brought in the Supreme Court for the purpose of determining the validity of the call and the right to sell, and that process in such action may be served on a shareholder resident out of the jurisdiction.

The plaintiffs then discontinued the first action by a notice of discontinuance dated the 24th April, 1918, and commenced the present action by a writ issued on the 31st May, 1918. In their statement of claim they allege that a call was made on the 18th October, 1917; and they claim, first, a declaration that the shares standing in the names of the defendants are not fully paid and are assessable and subject to call, and that the call of the 18th October, 1917, is valid, and that the plaintiffs are entitled to sell the shares; and, secondly, an order for the sale of the defendants' shares under the direction of the Court.

The Master's order is attacked upon several grounds. Upon the hearing I expressed an opinion adverse to the appellant upon all of the points except one, which is that the amendment to sec. 151 of the Ontario Companies Act is not applicable to the plaintiff company, and I reserved judgment only for the purpose of considering that one point; but, perhaps, before dealing with it, it would be well to restate what was said concerning the construction to be placed upon certain words in the amending Act.

The Act authorises service out of the jurisdiction "in the same

Rose, J.

1918

SUPERIOR
COPPER Co.
LIMITED
v.
PERRY AND
SUTTON.

Rose, J.

1918

SUPERIOR
COPPER CO.
LIMITED

v.

PERRY AND
SUTTON.

manner and subject to the same conditions as process is permitted to be served out of the jurisdiction in cases provided for by the Consolidated Rules." It is argued that the "conditions" referred to are to be found in Rule 25: that is to say, that it is a condition precedent to allowing service out of the jurisdiction that, e.g., the subject-matter of the action is land situate within Ontario, or relief is sought against a person domiciled within Ontario, or the defendant has assets in Ontario of the value of \$200, at least, which may be rendered liable for the satisfaction of the judgment. It is said that, if this is the true construction of the section, the judgment in 42 O.L.R. is decisive of the present motion, in that it establishes that an action such as this is not one to which any clause of Rule 25 applies. I do not think that the construction contended for is the true construction. It appears to me that each clause of Rule 25 names, not a "condition" of permitting service, but rather a case in which service may be allowed, and that the "conditions" are to be found, e.g., in Rules 26 to 30, which require that the application shall be supported by certain evidence, and that the order shall limit the time for appearance, and which establish the procedure for effecting the service. The statute of 1918 appears to me to add a new case to the cases mentioned in Rule 25, and to make the procedure laid down in the later Rules applicable to such new case.

The determination of the question as to the right of the plaintiff company to proceed under the amendment of 1918 involves an examination of certain earlier legislation.

The company was incorporated in 1901, under the provisions of the Ontario Companies Act, R.S.O. 1897, ch. 191, and the Ontario Mining Companies Incorporation Act, R.S.O. 1897, ch. 197. In 1907, upon the petition of the company, an Act was passed (7 Edw. VII. ch. 117) which, after a recital that the shareholders had paid less than the par value of their shares, but that, notwithstanding the fact that the share certificates had printed upon them (as required by the Mining Companies Incorporation Act) the words "subject to call," a question had arisen, owing to the form of the certificates, as to the right of the company to levy assessments, went on to declare that the shares upon which less than the par value had been paid were subject to call and assessable, and to enact that the company might from time to time levy

assessments and make calls, and that, in the event of default being made in the payment of such calls or assessments, the shares held by the defaulting shareholder might be sold and disposed of in accordance with the provisions contained in sub-secs. 4 and 5 of sec. 5 of the Ontario Mining Companies Incorporation Act.

In the course of the various revisions and consolidations of the Acts relating to companies generally, and to special classes of companies in particular, the Ontario Mining Companies Incorporation Act has disappeared; but sub-secs. 4 and 5 of sec. 5, with some slight verbal alterations, now form sec. 151 of the Ontario Companies Act, which is the section to which new sub-sections were added by the Act of 1918. The section, as it stood before the amendment, authorises the secretary of the company to sell at public auction the shares of any shareholder who makes default for 60 days in paying a call; the sub-sections added in 1918 authorise a company to which they apply to maintain an action for the sale of the shares in the Supreme Court, in lieu of having the secretary sell the shares, and also authorises the bringing of an action for the purpose of determining the validity of any call and the right to sell.

Mr. White's point is that the call in question in this action depends for its validity upon the special Act of 1907, and that the payment of the call must, therefore, be enforced, if at all, in the manner laid down by that Act, and not otherwise: that the Act of 1907 must be read as if the words of sub-secs. 4 and 5 of sec. 5 of the Mining Companies Incorporation Act had been written out in full in it; and that the amendment of 1918 is, therefore, wholly inapplicable. Mr. Langmuir contends that the reference in the Act of 1907 to the section of the Mining Companies Incorporation Act is to be read as a reference to that section as it now stands, i.e., to sec. 151 of the Ontario Companies Act, including the amendment: he refers to sec. 16 (b) of the Interpretation Act, R.S.O. 1914, ch. 1, and to the Act 3 & 4 Geo. V. ch. 2, sec. 10, printed at the beginning of the Revised Statutes, and to what was said in the Court of Appeal and in the Judicial Committee of the Privy Council in *Toronto and Niagara Power Co. v. Town of North Toronto* (1912), 25 O.L.R. 475, 2 D.L.R. 120, and [1912] A.C. 834.

Section 20 (b) of the Dominion Interpretation Act, R.S.C. 1906,

Rose, J.

1918

SUPERIOR
COPPER Co.
LIMITED

v.

PERRY AND
SUTTON.

Rose, J.

1918

SUPERIOR
COPPER CO.
LIMITED

v.

PERRY AND
SUTTON.

ch. 1, referred to in the case cited, is in the same words as sec. 16 (b) of the Ontario Interpretation Act, R.S.O. 1914, ch. 1; and, if the words in the special Act of 1907 were the same as the words in the Act under consideration in that case, I should think that Mr. Langmuir's argument was sound. But they are not the same. In the *Toronto and Niagara Power Company's Act*, 2 Edw. VII. ch. 107, sec. 21 (D.), the words were, "Section 90 . . . of the Railway Act shall apply to the company and its undertakings;" while the words in the special Act of 1907 are, "Such shares . . . may be sold and disposed of in accordance with the provisions contained in sub-sections 4 and 5 of section 5 of the Ontario Mining Companies Incorporation Act." This difference in the wording of the statutes appears to me to take the present case outside of anything that was decided in the *Toronto and Niagara Power Company* case; and I cannot find anything either in the Interpretation Act or in any of the cases which would authorise the Act of 1907 to be read as if it said, "Such shares may be sold and disposed of in accordance with the provisions contained in sub-sections 4 and 5 of section 5 of the Ontario Mining Companies Incorporation Act, or, in lieu of proceeding to sell under such sub-sections, the company may maintain an action for the sale . . ." If, therefore, this was the only point in the case, I should think that there was great force in the appellant's argument that the plaintiff company had not been given statutory power to maintain the action or to serve notice of the writ out of Ontario. I think, however, that it is not necessary to decide that point upon the present motion, because, whichever way it is decided, there is another point which cannot be decided upon the materials now before me, and which, if it is decided in favour of the plaintiffs, seems to authorise the institution of the action and the making of the order for service out of Ontario. Neither in the statement of claim nor in the affidavit upon which the order giving leave to issue the writ is based, is there any reference to the special Act of 1907, and Mr. Langmuir's contention is that the call does not depend for its validity upon the special Act, but could have been made and enforced even if that Act had not been passed. If he is right in this—if the company is not driven to rely upon the special Act—I do not see why it cannot avail itself of the legislation of 1918, which applies to a mining company incorporated before the 1st July, 1907 (see sec. 146). The fact

that the particular mining company has special power to enforce in a particular manner a call made under the authority of a special Act, does not seem to me to deprive it of the power of enforcing, in the manner open to all mining companies, any call which it makes, not under the authority of the special Act, but in pursuance of the power which it possesses in common with all other mining companies.

The question whether the call sought to be enforced is one which can be supported apart from the special Act is, obviously, a question which cannot be determined until all the facts are brought out at the trial of the action. The case, therefore, must go to trial, and the appeal fails. But I think it is a case for granting leave to enter a conditional appearance. It is true that, in the view which I take of the case, upon such materials as are before me, if there was no right to serve the notice of the writ out of Ontario, there is no right to sue at all; and the same facts that would justify the appellant in asking, at the trial, for a declaration that the Court has no jurisdiction over him, would justify him in asking for a declaration that the action will not lie; so that it may be that the appellant will be in just as strong a position at the trial if he has attorned to the jurisdiction as he will be in if he has not so attorned; but there may well be circumstances which have not been developed before me which would make it proper that he should not be precluded from questioning the jurisdiction of the Court. Therefore, while I adhere to all that was said in the case in 42 O.L.R. about the desirability of determining such questions at the earliest possible moment, I think the leave ought to be given in this particular case.

The costs will be costs to the plaintiffs in the cause, unless the trial Judge otherwise orders.

Rose, J.

1918

SUPERIOR
COPPER CO.
LIMITED
v.
PERRY AND
SUTTON.

1918

Nov. 1.

[MEREDITH, C.J.C.P.]

RE SPELLMAN AND LITOVITZ.

Vendor and Purchaser—Agreement for Sale of Land—Objections to Title—Power of Appointment—Validity of Execution—Conveyancing and Law of Property Act, sec. 24—Discharge of Mortgage Made to Executors—Necessity for Execution by All—Special Power Given to Majority.

The exercise of a power of appointment of land, where the instrument creating the power does not provide for the manner in which it is to be executed, is not invalid because not made in the manner provided for in sec. 24 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109.

Where a mortgage is made to all of the executors and trustees under a will, there is no power in any less than all of them, who are living, to give a valid discharge of the mortgage, unless some special power has been conferred upon them to do so; where the will confers upon a majority of the executors power to discharge mortgages which under the will they are empowered to take, there is no reason in law why such a mortgage should not be so discharged.

Quare, whether one of several living executors could alone give a valid discharge of a mortgage made to their testator.

Ex p. Johnson (1875), 6 P.R. 225, considered.

Objections made to the title to land, upon an agreement for sale and purchase, declared invalid.

MOTION by the vendor for an order, under the Vendors and Purchasers Act, declaring invalid the objections made by the purchaser to the title to land, the subject of an agreement of sale and purchase.

October 16. The motion was heard by MEREDITH, C.J.C.P., in the Weekly Court, Toronto.

G. R. Forneret, for the vendor.

E. F. Singer, for the purchaser.

November 1. MEREDITH, C.J.C.P.:—It is said, by counsel for the parties to the contract in question, that two neat questions have arisen respecting the title to the land in question; but the title-deeds, out of which it is said that such questions arise, are not produced, and no facts have been proved from which it can be learned whether such questions, in my opinion, really do so arise, and therefore I am obliged to dispose of this matter just as it has been stated by the parties through counsel.

And the first question, so stated, is: whether the exercise of a power of appointment of land is invalid if not made in the manner provided for in sec. 24 of the Conveyancing and Law of Property

Act, R.S.O. 1914, ch. 109, in a case in which the instrument creating the power does not provide for the manner in which it is to be executed.

The purpose of this legislation seems to me to have been only to give relief from burdensome and needless requirements in that respect sometimes contained in instruments creating such powers; not to make the manner of execution more burdensome in cases in which no burden had been imposed by the creator of the power: and, if that enactment had not been passed, all that would have been necessary in this case, for the purposes of the parties to this matter, is that the provisions of the Statute of Frauds and of the Registry Act should have been complied with; and it is admitted that they were.

The words of the enactment in question are quite different from those of the Wills Act upon the same subject. Those of the enactment in question are: "A deed executed," in the manner provided for in it, "shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing, not testamentary, notwithstanding that it is especially required that a deed or instrument in writing, made in exercise of such power, shall be executed or attested with some additional or other form of execution or attestation or solemnity. . . ."

Whilst those of the Wills Act, R.S.O. 1914, ch. 120, sec. 13, are: "No appointment made by will, in exercise of any power, shall be valid unless the same is executed" in the manner required by that enactment: and yet, notwithstanding these strong words, it has been decided that there may be appointments validly made by will—by foreign wills—not made in the manner required by the Wills Act: see *In re Price, Tomlin v. Latter*, [1900] 1 Ch. 442; *Pouey v. Hordern*, *ib.* 492; *In re Simpson*, [1916] 1 Ch. 502; and *In re Wilkinson's Settlement*, [1917] 1 Ch. 620, 627.

Attention may also be called to the fact that in the revision of the statutes of Ontario the enactment in question has been in words changed considerably from its form as originally taken from the enactment in England and as continued here until 1 Geo. V. ch. 25; that the somewhat complicated words of its last provision have been cut down by the revisers of the statutes, for the purpose of removing all excuse for misunderstanding, to:

Meredith,
C.J.C.P.

1918

RE
SPELLMAN
AND
LITOVITZ.

Meredith,
C.J.C.P.

1918

RE
SPELLMAN
AND
LITOVITZ.

"Nothing in this section shall prevent the donee of a power from executing it conformably to the power."

My conclusion is that the vendor is right in his contention upon this point; that, upon the case as stated by counsel, the vendee's objection to the validity of the execution of the power of appointment fails; and I should not have deemed it necessary to take time for consideration of the point but for a paragraph in the last edition of Farwell on Powers, which seemed to me to convey an opinion of the learned author that such a power as that in question, if not exercised by will, must be executed in conformity with the writing creating the power or else in the manner set out in the enactment in question. Whether the execution, if defective, would have been aided in a Court of Equity, for want of information as to the facts, cannot be considered.

The next question, as so stated, was: whether less than all of the living executors of a will can give a valid discharge of a mortgage of land so as to revest the land in the mortgagor: and it is strange that so little light upon a matter of so common occurrence—the discharge of a mortgage by executors—was found. In a case of *Ex p. Johnson*, 6 P.R. 225, it is said to have been ruled by the Vice-Chancellor Blake—in the year 1875—that one of several executors alone could execute a valid discharge of such a mortgage: and nothing but this ruling, directly upon the point, has been found by me, though much indirectly affecting the question is easily discovered: see the Registry Act, secs. 62 and 67; the Interpretation Act, sec. 28; the Mercantile Law Amendment Act, sec. 4; the Mortgages Act, sec. 10; the Trustee Act, secs. 27 and 49; *Dilke v. Douglas* (1880), 5 A.R. 63; *Matson v. Dennis* (1864), 4 DeG. J. & S. 345, 350; and *Powell v. Brodhurst*, [1901] 2 Ch. 160.

The trend of legislation seems to have been toward empowering any hand entitled by law to receive the debt, and to give a valid discharge of it, also to reconvey, by way of a statutory discharge of a registered mortgage, the land pledged for its payment; but whether that trend has reached the case of one of several executors need not be now considered, for it does not in fact really arise in this case.

The scanty information afforded as to the actual facts, out of which the stated questions arise, shews that the mortgage in

question was not made to the testator, but was made to all of the executors and trustees under his will; and I know of no power in any less than all of them, who are living, to give a valid discharge of the mortgage, unless some special power has been conferred upon them to do so.

It was said, at some time during the argument, that the will of the testator conferred upon a majority of his executors power to discharge mortgages which under the will they were empowered to take: and, if that be so, there is nothing that I know of in law preventing a mortgage, so taken, being so discharged: see *Ewart v. Snyder* (1867), 13 Gr. 55, at p. 57.

Therefore, if the fact be as so stated, the vendee fails on this point also; otherwise he is right in requiring the concurrence of all the surviving executors and trustees in a discharge of the mortgage.

[IN CHAMBERS.]

STONE V. WORLD NEWSPAPER CO. LIMITED.

Libel—Newspaper—Security for Costs—Libel and Slander Act, sec. 12 (1)—Jurisdiction of Master in Chambers—Words “Involving a Criminal Charge”—Sec. 12 (2)—Attributing to Plaintiff Intention to Commit Suicide—Criminal Code, secs. 269, 270.

The Master in Chambers has jurisdiction to make an order under sec. 12 (1) of the Libel and Slander Act, R.S.O. 1914, ch. 71, for security for the costs of an action for libel, brought against the publishers of a newspaper.

The libel alleged was, that the plaintiff “will kill herself” or “will have to kill herself,” meaning thereby, as the plaintiff alleged in the statement of claim, that “the plaintiff . . . contemplated or intended to put an end to her life:”—

Held, that the alleged libel did not “involve a criminal charge” within the meaning of sec. 12 (2).

The words alleged to be libellous did not charge an offence under sec. 269 or 270 of the Criminal Code. The utmost they attributed to her was a contemplation or intention of committing suicide, which is not criminal.

Eagleton’s Case (1855), 1 Dears. 515, 538, and *Rex v. Robinson*, [1915] 2 K.B. 342, 348, applied.

MOTION by the plaintiff to set aside an order of the Master in Chambers directing the plaintiff to give security for costs in a libel action against the publishers of a newspaper, and staying proceedings in the meantime, on the grounds that the order was made without jurisdiction and that the action was not one in

Meredith,
C.J.C.P.

1918

RE
SPELLMAN
AND
LITOVITZ.

1918

Nov. 2.

1918
 ———
 STONE
 v.
 WORLD
 NEWSPAPER
 CO.
 LIMITED.

which security should be ordered under the Libel and Slander Act, R.S.O. 1914, ch. 71, sec. 12.*

October 29. The motion was heard by LATCHFORD, J., in Chambers.

H. T. Beck, for the plaintiff.

K. F. Mackenzie, for the defendants.

November 2. LATCHFORD, J.:—An application for security under sec. 12(1) may be made to “the Court or a Judge,” and would properly be made in Chambers. As the matter does not fall under any of the exceptions stated in Rule 208, the Master in Chambers had jurisdiction.

Under sub-sec. (2) of sec. 12, a defendant is not entitled to security for costs where the alleged libel “involves a criminal charge.”

The libel alleged in this case is: The plaintiff “will kill herself” or “will have to kill herself,” meaning thereby, to use the words of the statement of claim, “the plaintiff . . . contemplated or intended to put an end to her life.”

This statement with the innuendo mentioned is said to involve a criminal charge. If it does, the defendants are not entitled to security for costs.

Suicide is a felony at common law. Sir Matthew Hale says, P.C., vol. 1, p. 411: “No man hath the absolute interest of himself but, 1. God Almighty hath an interest and propriety in him, and

*12. (1) In an action for libel contained in a newspaper the defendant may, at any time after the delivery of the statement of claim, or the expiry of the time within which it should have been delivered, apply to the Court or a Judge for security for costs, upon notice and an affidavit by the defendant, or his agent, shewing the nature of the action and of the defence, that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a judgment is given in favour of the defendant, that the defendant has a good defence upon the merits, and that the statements complained of were published in good faith, or that the grounds of action are trivial or frivolous; and the Court or Judge may make an order that the plaintiff shall give security for costs, which shall be given in accordance with the practice in cases where a plaintiff resides out of Ontario, and the order shall be a stay of proceedings until the security is given.

(2) Where the alleged libel involves a criminal charge the defendant shall not be entitled to security for costs under this Act, unless he satisfies the Court or Judge that the action is trivial or frivolous, or that the circumstances which, under section 8 entitle the defendant at the trial to have the damages restricted to actual damages appear to exist, except the circumstance that the article complained of involves a criminal charge.

therefore self-murder is a sin against God. 2. The King hath an interest in him, and therefore the inquisition in case of self-murder is *felonicè et voluntariè seipsum interfecit et murderavit contra pacem domini regis.*" But the only means of punishing the crime was by forfeiture of the goods and chattels of the deceased, and by subjecting his body to an ignominious burial. Forfeiture in cases of *felo de se*, as in other cases, was abolished in Canada by 55 & 56 Vict. ch. 29, sec. 965 (now sec. 1033 of the Criminal Code), following sec. 1 of the remedial provisions of the Abolition of Forfeitures Act of 1870, 33 & 34 Vict. ch. 23 (Imp.), which is not in force in Canada: *Dumphy v. Kehoe* (1891), 21 Rev. Leg. 119, cited, apparently with approval, by Boyd, C., in *Young v. Carter* (1912), 26 O.L.R. 576, 5 D.L.R. 655.

By sec. 10 of the Criminal Code, the criminal law of England, as it existed on the 17th September, 1792, in so far as not repealed, and as altered etc. by the Acts in that section mentioned, forms the criminal law of Ontario. The right then existing on the part of coroners of directing the body of a suicide to be buried in the highway has never been abrogated here by statute, though taken away in England in 1823 by 4 Geo. IV. ch. 52. It still exists, though fallen into disuse owing to adverse public sentiment. The uncertain opinion to the contrary expressed by Judge Boys—Coroners, 4th ed., p. 103—appears to me to be without foundation.

The provisions of the Criminal Code regarding aiding or counselling suicide, secs. 269 and 270, do not in any way affect the crime itself. Apart from the relief afforded against forfeiture, the punishment here is, strictly speaking, the same as at common law, though no longer enforced.

By sec. 269 it is an indictable offence to counsel or procure any person to commit suicide when the suicide is actually committed in consequence of such counsel or procurement, or to aid or abet any person in the commission of suicide.

Section 270 makes an attempt at suicide an indictable offence.

The words alleged to be libellous do not involve a criminal charge against the plaintiff under sec. 269 or sec. 270. Assuming the innuendo found as pleaded, the utmost they attribute to her is a contemplation or intention of committing suicide. "The mere intention to commit a misdemeanour is not criminal. Some act is required:" Parke, B., in *Eagleton's Case* (1855), 1 Dears. 515,

Latchford. J.

1918

STONE

v.

WORLD
NEWSPAPER
Co.
LIMITED.

Latchford, J.

1918

STONE

v.

WORLD
NEWSPAPER
Co.
LIMITED.

at p. 538. Lord Reading in *Rex v. Robinson*, [1915] 2 K.B. 342, at p. 348, calls this statement of the law a safe guide. Contemplation is less than intention; and, the distinction between felony and misdemeanour being abolished by sec. 14 of the Code, a statement that the plaintiff intended to commit suicide no more involves a criminal charge than a statement that she intended to commit what in Baron Parke's time was called a misdemeanour.

As the alleged libel does not, in my opinion, involve a criminal charge, the plaintiff is not entitled to the advantages afforded by sub-sec. (2) of sec. 12, and the order appealed from cannot be set aside.

The motion is, therefore, dismissed. For reasons expressed upon the argument, I make no order as to costs.

[IN CHAMBERS.]

1918

Nov. 5.

REX v. NAZZARENO.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 40—Having or Keeping Intoxicating Liquor on Premises for Sale, Barter, or other Disposal—Evidence—Admissibility—Native Wine Found on Premises—Onus—Sec. 88—"Other Disposal"—Lawful Disposal—Amendment—Criminal Code, sec. 1124.

Under the Ontario Temperance Act, 6 Geo. V. ch. 50, sec. 44, a manufacturer of native wines is permitted to sell his product; but a purchaser of native wines, if prosecuted for having or keeping liquor on his premises for the purpose of sale, barter, or other disposal, in contravention of sec. 40, is subject to the onus imposed by sec. 88.

N. was prosecuted for having or keeping intoxicating liquor on his premises for the purpose of sale, barter, or other disposal. Native wine—less than 4 gallons—was found on his premises, and on analysis was found to contain over 25 per cent. of proof spirit. N. was convicted by a magistrate, and moved to quash the conviction:—

Held, that no evidence was improperly admitted, and the rule laid down in *Rex v. Melvin* (1916), 38 O.L.R. 231, did not apply.

Held, also, that the words "or other disposal" did not vitiate the charge or conviction, although there might be a lawful "disposal," such as the use of the wine by N. and his family. The words "other disposal" might cover "treating," as in *Regina v. Walsh* (1897), 29 O.R. 36. And the words might be struck out under the powers conferred by sec. 1124 of the Criminal Code, made applicable by sec. 92 (9) of the Ontario Temperance Act and sec. 4 of the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90.

Held, lastly, that the onus placed upon N. by sec. 88 had not been discharged. The motion was, therefore, dismissed.

MOTION to quash the conviction, by the Police Magistrate in and for the City of Hamilton, on the 9th October, 1918, of Ceciloni

Nazzareno, for having or keeping intoxicating liquor on his premises in the City of Hamilton, for the purpose of sale, barter, or other disposal, in contravention of *sec.* 40 of the Ontario Temperance Act, 6 Geo. V. ch. 50. The defendant was sentenced to pay a fine of \$200 and \$2 costs.

1918
 REX
 v.
 NAZZARENO.

October 29. The motion was heard by LATCHFORD, J., in Chambers.

M. J. O'Reilly, K.C., for the defendant.

J. R. Cartwright, K.C., for the Crown.

November 5. LATCHFORD, J.:—The grounds of the motion are, in brief, that evidence was improperly admitted of entries in the books of an express company, and of a record which the License Inspector had obtained at St. Catharines of a letter which he had written, and of the taking and analysing of a sample without proof of where the sample came from or to whom it belonged. The reception of such evidence affected, it is contended, the mind of the magistrate, and the case falls within the rule laid down in *Rex v. Melvin* (1916), 38 O.L.R. 231, 34 D.L.R. 382, and followed in *Rex v. Bracci* (1918), 14 O.W.N. 305.

Another ground of the motion is that, the conviction being for keeping liquor "for sale, barter, or other disposal," the words "or other disposal" vitiate the charge and conviction, inasmuch as "other disposal" involves the use (as yet permissible) of the liquor—which was native wine—by the accused and the members of his family.

It is also urged that, as the sale of native wine by a manufacturer in quantities of 5 gallons and upward, or of not less than a dozen bottles, is sanctioned by *sec.* 44 of the Act, the keeping of wine in a private house like Nazzareno's, in the quantity found there—less than 4 gallons—did not throw upon the accused, who gave no evidence, the burden imposed by *sec.* 88.*

I am satisfied that the evidence of the entries in the express

* 88. If, in the prosecution of any person charged with committing an offence against any of the provisions of this Act in the selling or keeping for sale or giving or keeping or having or purchasing or receiving of liquor, *prima facie* proof is given that such person had in his possession or charge or control any liquor in respect of, or concerning which, he is being prosecuted, then unless such person prove that he did not commit the offence with which he is charged he may be convicted accordingly.

Latchford, J.

1918

REX

v.

NAZZARENO.

company's books was admissible for the little it was worth. It would be clearly proper if followed by evidence of the person who actually delivered the consignments. In the absence of such evidence, the entries had no probative value; and that, it seems to me, is the utmost that can be objected to them.

No evidence of any record obtained at St. Catharines was tendered or admitted. It was stated as a fact by the Inspector when giving his testimony that he had such a record with him when questioning the accused.

Mr. Washington in prosecuting had asked: "Did you at that time have a record with you of the number of gallons that he had got from St. Catharines? A. Yes. Q. Did you tell him? A. I did. Q. What did he say? A. He did not say yes or no. Q. Did you tell him what it was? A. Told him what it was and took a sample of it. Q. How many gallons did you tell him he had within about 30 days? A. Told him 30 or 40 gallons—I forget which of the two."

A letter which the Inspector had written was referred to merely to refresh his memory as to whether it was not 40 gallons rather than 30 which he mentioned to Nazzareno—a matter of no importance. There was evidence of the taking of a sample of the wine and of its analysis. *Rex v. Melvin* and *Rex v. Bracci* have no application.

While a manufacturer of native wines is permitted to sell his product, a purchaser, if prosecuted, is subject to the onus imposed by sec. 88. Nazzareno was a person prosecuted for having or keeping liquor on his premises for the purpose of sale, barter, or other disposal. Proof was given that he had in his possession a quantity of native wine, containing over 25 per cent. of proof spirit, and therefore "liquor" (sec. 2 (f)). "Then," to quote the concluding words of sec. 88, "unless such person prove that he did not commit the offence with which he is so charged he may be convicted accordingly."

The onus so cast upon the accused he did not attempt to remove.

The words "other disposal" are not as innocuous as Mr. O'Reilly contends: *Regina v. Walsh** (1897), 29 O.R. 36.

* In *Regina v. Walsh* it was held that the words "other disposal" in sec. 54 of the Liquor License Act, R.S.O. 1887, ch. 194, covered treating or giving liquor to friends by a licensee in a private room in his licensed premises on a Sunday, and that such treating was an offence against sec. 54.

In any case their use does not vitiate the conviction. If it did, they could be struck out under the powers conferred by sec. 1124 of the Criminal Code, made applicable to motions like this by sec. 92 (9) of the Ontario Temperance Act and sec. 4 of the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90.

The application fails on all grounds and is dismissed with costs.

Latchford, J.

1918

REX

v.

NAZZARENO.

[LATCHFORD, J.]

1918

Nov. 7.

SUSMAN v. BAKER.

Contract—Sale and Delivery of Goods at Named Prices per Ton—Breach—Deficiencies in Deliveries—"About"—"Approximate"—Damages—Allowances—Mistake in Wording of Written Contract—Finding of Referee—Discrediting of Witnesses—Appeal.

Where the subject of a contract of sale of goods is not a bulk lot with an estimate of the probable quantity, but the engagement is to furnish goods to a certain amount, the quantity specified is material, and governs the contract. The addition, in such a case, of a qualifying word such as "about" or "approximate," when not supplemented by other words, provides only against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight.

Brawley v. United States (1877), 96 U.S. 168, and *Steel Co. of Scotland v. Tancred Arrol & Co.* (1899), 26 Sc. L. Repr. 305, 314, followed.

A contract for the supply by the defendants of "about 150 tons" of shell steel turnings at so much a ton, and another for "approximate quantities" of "200 tons steel shell turnings" at so much a ton and "100 tons shell ends and defective shells" at so much a ton, were made. Under the first contract, precisely 100 tons were delivered; under the second, 175 tons instead of 200, and 38 and a fraction instead of 100:—

Held, that, in estimating the damages for breach of the contract, no allowance should be made in favour of the defendants on account of the use of the words "about" and "approximate"—the damages should be based on the actual deficiencies.

Report of a referee varied on appeal.

Before the referee the defendants contended that in the second contract "200" was a mistake; but the referee discredited the evidence which was adduced on this point by the defendants:—

Held, that the appellate tribunal was not in a position to differ from the referee on this point.

Wood v. Haines (1917), 38 O.L.R. 583, 586, followed.

An appeal by the defendants and a cross-appeal by the plaintiffs from the report of the Local Registrar at Kingston, acting as referee, upon a reference directed by the judgment in the action, dated the 16th August, 1917, to ascertain the plaintiffs' damages upon breaches of contract for the sale and delivery of goods.

1918
SUSMAN
v.
BAKER.

October 16. The appeal and cross-appeal were heard by LATCHFORD, J., in the Weekly Court, Ottawa.

George D. Kelley, for the defendants.

A. B. Cunningham, for the plaintiffs.

November 7. LATCHFORD, J.:—The defendants contend that the learned referee erred in finding that they were under contract to deliver to the plaintiffs 350 tons of steel shell turnings, less an allowance estimated at 5 per cent., owing to the use of the words “about” and “approximate” in the correspondence. They allege that he also erred in awarding damages for the non-delivery of 56 $\frac{6}{7}$ tons of shell ends and defective shells; and that he should have allowed the defendants their counterclaim for \$143, the amount the defendants paid as freight upon a car of scrap steel shipped at the request of the plaintiffs from Tomiko to Hamilton, where acceptance of it was refused, necessitating reshipment to the defendants at Ottawa.

The defendants further urge that, even if the findings are approved as to the quantities contracted for, the allowance made by the learned referee of 5 per cent., owing to the use of the words “about” and “approximate,” should be increased to at least 10 per cent.

The plaintiffs say—and this is all the cross-appeal is concerned about—that the learned referee should not have allowed even 5 per cent. off the quantities mentioned in the letters relied on as evidencing the contracts between the parties.

The contract of the 20th October, 1916, as evidenced by the letters of that date, was for about 150 tons of shell steel turnings at \$6.25 a gross ton, f.o.b. Hamilton.

The second contract, as concluded according to the defendants’ letter of the 30th October, and the plaintiffs’ letter of the 31st October, was for “approximate quantities” of “200 tons steel shell turnings at \$3.60 per gross ton and 100 tons shell ends and defective shells at \$12.75 per gross ton, all f.o.b. Renfrew.”

It was contended by the defendants that “200” was used in their letter by mistake, and that they did not observe the figures “200” in the confirming letter received from the plaintiffs.

The learned referee discredited the evidence adduced on the point by the defence, which was inconsistent with the documents.

"It must be an extraordinary case in which the appellate tribunal can accept the responsibility of differing as to the credibility of witnesses from the trial Judge who has seen and watched them, whereas the appellate Judge has had no such advantage." Lord Wrenbury, delivering the judgment of the Judicial Committee of the Privy Council in *Wood v. Haines* (1917), 38 O.L.R. 583, 586. To the same effect is the recent and as yet unreported decision of the Supreme Court of Canada in *Morrow Cereal Co. v. Ogilvie Flour Mills Co. Limited*, restoring the decision of the trial Judge, which was but in part affirmed by the Appellate Division: *Ogilvie Flour Mills Co. Limited v. Morrow Cereal Co.* (1917), 41 O.L.R. 58.

The true reason for the defendants' contention, and for their failure to deliver the quantities stated, is, that steel scrap advanced very rapidly in price soon after the contracts were made.

In ascertaining the meaning of the words "about" and "approximate," and determining whether the allowance of 5 per cent. off the quantities specified should not be made, as is alleged by the plaintiffs, or is too low, as alleged by the defendants, the fact must be regarded that in neither case was the sale a sale of a bulk lot of scrap with an estimate of the probable quantity. In such a case all that is required is good faith on the part of the person making the estimate.

Where no such independent circumstances are referred to, and the engagement is to furnish goods to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words in such cases—when not supplemented by other words—only provides against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight.

Such are the principles laid down by the Supreme Court of the United States in *Brawley v. United States* (1877), 96 U.S. 168, cited with approval by Lord Shand in *Steel Co. of Scotland v. Tancred Arrol & Co.* (1899), 26 Sc. L. Repr. 305, at p. 314. See also 1 Corp. Jur. 337.

In the contracts between the parties the quantities mentioned were not estimated, and are not affected by supplemental words other than "about" and "approximate," as was the case in *Morris v. Levison* (1876), 1 C.P.D. 155—"a full and complete cargo of iron

Latchford, J.

1918

SUSMAN

v.

BAKER.

Latchford, J.

1918

SUSMAN

v.

BAKER.

ore, say about 1,100 tons"—and in *Miller v. Borner & Co.*, [1900] 1 Q.B. 691—"a cargo of ore, say about 2,800 tons." In each of these cases a percentage of 3 per cent. or less was held to satisfy the contract.

The use of the words "about" and "approximate" was, no doubt, due to the possibility of there being a slight excess or deficiency in the quantities shipped. Yet, in the case of the first contract, precisely 100 tons, out of 150 tons of shell turnings contracted for, were delivered. Under the second contract, the quantity delivered was 175 tons instead of 200 tons. The total default amounted to 75 tons.

Upon the shell ends and defective shells the total delivery was 38 $\frac{1}{4}$ tons, leaving a deficiency of 61 $\frac{3}{4}$ tons.

If an honest effort had been made to fulfil the contracts, and there had been an excess or deficiency of as much even as 2 or 3 tons, I should be disposed, in order to give due effect to the qualifying words "about" and "approximate," to declare the contracts fulfilled. But, in the circumstances disclosed by the evidence, the percentage allowed by the learned referee not only must not be increased, but must be eliminated in arriving at the amount of the damages.

At \$6.40 per ton the damages are to be assessed upon a deficiency of 50 tons instead of 42 $\frac{1}{2}$, thus increasing the sum allowed from \$278.28 to \$327.50, or by \$49.12.

Similarly the deficiency in the steel turnings under the second contract should be 25 tons instead of 15; thus increasing the damages assessed by \$64.

Five tons must be added to the tonnage of shell ends and defective shells, resulting in an increase of the damages under this item by \$26.25.

As found by the learned referee, the defendants have not established that they suffered any damages by the refusal of the plaintiffs to accept the car of scrap steel shipped from Tomiko to Hamilton. Prices had so advanced that there was no loss.

In the result, the defendants' appeal stands dismissed with costs and the plaintiffs' appeal allowed with costs.

The report is amended by adding to the sum found due by the defendants the amount by which the damages should be increased, \$139.37.

[APPELLATE DIVISION.]

1918

Nov. 8.

SMITH V. ONTARIO AND MINNESOTA POWER CO. LIMITED.

Water—Erection by Power Company of Dam in Navigable River—Flooding of Lands above Dam—Trespass—Ashburton Treaty of 1842, art. II.—Provision for Open Water Communications—Damage Complaind of not Arising from Interference with Right of Passage—Abrogation of Treaty by Arrangement between Canada and United States—Approval of Works by Order of Governor-General in Council—Special Act, 4 & 5 Edw. VII. ch. 139(D.)—General Act respecting Works Constructed in or over Navigable Waters, R.S.C. 1886, ch. 92, secs. 1-9—Advantage of Navigation—Validity of Order in Council—Representation as to Statutory Charge of Compensation for Damage to Lands—Condition or Limitation of Powers—Obligation to Make Compensation—Cause of Flooding—Actus Dei or Vis Major—Claims of Squatters upon Crown Lands—Agreement between Crown and Company—Right to Flood Lands—Claims of Owners of Lands—Prescription—Flooding in Part Caused by Dam—Assessment of Damages for Part of Injury—Absence of Negligence.

Upon appeal from the judgment of KELLY, J., 42 O.L.R. 167, and upon the facts there stated, and the additional facts that by a Dominion Act respecting the defendant company, 4 & 5 Edw. VII. ch. 139, the company were required to submit the plans of their works to the Governor-General in Council, and submitted them accordingly, but explicitly under the general Act, R.S.C. 1886, ch. 92, an Act respecting certain works constructed in or over Navigable Waters, and that the plans were approved by order in council of the 19th September, 1905, it was *held*:—

(1) That art. II. of the Ashburton Treaty of 1842, providing that all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage from the shores of Lake Superior to the Pigeon River, should be free and open, did not further the plaintiffs' contention that the defendants' dam upon the Rainy River at Fort Frances was illegally erected and maintained: the damage complained of did not arise from interference with the plaintiffs' right to pass along the water communications; and the provision of the Treaty had no reference to the rights of land-owners or others near the route.

Gorris v. Scott (1874), L.R. 9 Ex. 125, applied.

And, *semble*, even if the provision did apply, the two countries, acting together, could abrogate it, at least so far as it affected the citizens or subjects of both.

(2) That the Dominion, having, under sec. 91(10) of the British North America Act, jurisdiction over navigation, had jurisdiction to cause or allow any Act or work within the Dominion for the advantage of navigation; the defendants' dam being considered such a work, the Dominion had jurisdiction in the premises; and the order in council of the 19th September, 1905, was valid—the authority to approve such a work as the defendants' dam being given to the Governor in Council by R.S.C. 1886, ch. 92, secs. 1 to 9.

(3) That the order in council was based upon the representation that a clause in the Act of incorporation of the defendant company made "all damages to lands caused by their works a charge to be borne by them," and those words must be read as a condition imposed on the company or a limitation of their powers—the company had no power to do damage to lands without paying compensation.

(4) There was nothing to indicate that the flood came under the category of *actus Dei* or *vis major*.

(5) That, by an agreement between the Crown and certain persons acting on behalf of the company, dated the 9th January, 1905, and recognised by the Act 6 Edw. VII. ch. 132(O.), the defendants had the right to flood

1918
 ———
 SMITH
 v.
 ONTARIO
 AND
 MINNESOTA
 POWER CO.
 LIMITED.

the lands upon which the buildings of three of the plaintiffs were erected these lands being lands of the Crown, and the three plaintiffs being mere squatters; these plaintiffs had no valid claim for damages for the exercise on land of rights expressly conferred by the owner, who could himself have exercised those rights; and their actions should be dismissed.

(6) That to the other two plaintiffs, who were the owners of lands injured by flooding, the defendants were liable to make compensation: there was no pretence of prescription, and it had been proved that but for the defendants' dam the flood would have passed these two plaintiffs (in part) scatheless.

Greenock Corporation v. Caledonian R.W. Co., [1917] A.C. 556, followed.

(7) That these two plaintiffs were entitled to recover for the difference between the whole damage and what would have occurred in the absence of the dam.

Nitro-Phosphate and Odam's Chemical Manure Co. v. London and St. Katharine Docks Co. (1878), 9 Ch. D. 503, and *Workman v. Great Northern R.W. Co.* (1863), 32 L.J. Q.B. 279, followed.

(8) That the evidence did not warrant a finding of negligence on the part of the defendants.

Judgment of KELLY, J., varied.

AN appeal by the defendants in the above and four other actions from the judgment of KELLY, J., 42 O.L.R. 167.

September 23 and October 8, 9, 10, and 11. The appeal was heard by MEREDITH, C.J.O., MAGEE and HODGINS, JJ.A., RIDDELL, J., and FERGUSON, J.A.

W. N. Tilley, K.C., and *A. D. George*, for the appellants. The learned trial Judge has held the appellants responsible for a rise in the water in Rainy Lake by which, as it was alleged, the plaintiffs suffered damage. All of these plaintiffs with the exception of Tighe (and possibly M. H. Smith) were squatters, and had no title to the lands occupied by them. The trial Judge erred in not attaching due weight of the evidence of Prof. Meyer, whose capacity and credibility are undoubted and are not attacked, and who has for years made a special study of the physical features of the locality. The onus is upon the plaintiffs to shew that the water in 1916 was higher than it would have been if no dam had been built. There is no force in the plaintiffs' contention that the appellants had no right to maintain the dam because it was contrary to the provisions of the Ashburton Treaty of 1842, art. II. There is nothing in the appellants' works which interferes with the rights secured by the Treaty, and in any case the right to build the dam has been recognised by both Provincial and Dominion legislation: 4 & 5 Edw. VII. ch. 139 (D.); 6 Edw. VII. ch. 132 (O.) The Dominion had jurisdiction in the matter, as the work was not a mere local one within the Province of Ontario, but part of a

larger work extending beyond the limits of the Province. The Backus agreement, under which the appellants acted, had received legislative recognition by the Ontario Act, and the appellants would not be liable for damage caused by their works unless it could be shewn that they had been negligent in operating them, which was not the case here, as the evidence shews that the appellants did everything in their power to avert the consequences of the extraordinary flood. *Greenock Corporation v. Caledonian R.W. Co.*, [1917] A.C. 556, cited by the trial Judge, does not apply to a case like this, where the appellants acted under lawful authority. [MEREDITH, C.J.O., referred to *McDougall v. Snider* (1913), 29 O.L.R. 448, 15 D.L.R. 111.] That case is very similar to the case here. The learned trial Judge seems to have been unduly impressed with the idea that the appellants were high-handed and contumacious in their manner of dealing with the situation, a view which does not appear to be warranted by the evidence. Reference was made to *Nichols v. Marsland* (1876), 2 Ex. D. 1; Lefroy's *Canada's Federal System*, p. 445 *et seq.*, and cases there cited; *Isherwood v. Ontario and Minnesota Power Co.* (1911), 18 O.W.R. 459, 2 O.W.N. 651.

J. R. Cartwright, K.C., for the Attorney-General for Ontario, thought the contention of the plaintiffs as to the Ashburton Treaty an extraordinary one. The legislative power which enacts can also repeal, and in this case there were enactments by both nations, parties to the treaty, which annul its effect so far as the present question is concerned. He referred to *Walker v. Baird*, [1892] A.C. 491.

R. T. Harding and *C. R. Fitch*, for the plaintiffs, respondents, argued that the findings of the learned trial Judge as to the negligence of the appellants were fully justified by the evidence and the records kept by the appellants, on which the respondents had to rely. The trial Judge was justified in the comments which he made on Prof. Meyer's evidence, and also in his disbelief of the witness Backus. It was plain that greed was the ruling motive in the defendants' method of operating their works. They disregarded the rights and interests of adjoining proprietors and took a chance to make all the money they could. They had no authority from any source to flood the lands of the plaintiffs. They could not get it from the Federal Government, which has no authority over lands.

App. Div.
1918

SMITH

v.

ONTARIO
AND
MINNESOTA
POWER CO.
LIMITED.

App. Div.
1918
—
SMITH
v.
ONTARIO
AND
MINNESOTA
POWER CO.
LIMITED.

The Ashburton Treaty is in force to-day, and is in effect a grant made in 1842 to the citizens of Canada and the United States of free and open passage over the waters of the Rainy River. Such a treaty cannot be abrogated by a private Act, such as that under which the appellants claim. *Minnesota Canal and Power Co. v. Pratt* (1907), 101 Minn. 197, shews that the treaty has not been abrogated in the United States. [RIDDELL, J., referred to *Gorris v. Scott* (1874), L.R. 9 Ex. 125.] Reference was also made to *Rainy River Boom Corporation v. Rainy Lake Lumber Co.* (1912), 27 O.L.R. 131, 6 D.L.R. 401; *Attorney-General for Canada v. Attorneys-General for Ontario Quebec and Nova Scotia*, [1898] A.C. 700; *Liverpool Corporation v. H. Coghill & Son Limited*, [1918] 1 Ch. 307; the very recent *Greenock Corporation* case, *supra*, which is cited by the trial Judge and is strongly in the respondents' favour; the *Isherwood* case, *supra*; *Davies v. Mann* (1842), 10 M. & W. 546. *Tilley*, in reply.

November 8. The judgment of the Court was read by RIDDELL, J.:—This is an appeal by the defendants from the judgment of Mr. Justice Kelly, 42 O.L.R. 167. The facts connected with the defendants' undertaking are set out in part in the reasons for judgment: it should, however, be added that the defendants also obtained legislation by the Dominion, and that pursuant to that legislation they made an application to the Governor-General in Council, under ch. 92 of the R.S.C. 1886, an Act respecting certain works constructed in or over Navigable Waters, and had these plans approved by order in council.

They built their dam, with the natural and necessary result of holding back the water in the river and also in the lake—that is what the dam was for.

In 1916 there was an unusual flood—the reason is thus given by an engineer called by the defendants: “The high water in the month, the latter part of April and the months of May, June, July, and possibly August, of 1916, was caused by the heavy rainfall in October and November of 1915, and the heavy fall of snow in the winter of 1915-1916, which practically all remained on the ground until about the 10th April, 1916, and it had about the same effect as if the entire precipitation had occurred in the fore part of April, 1916. The accumulated snow did not commence to thaw

until April, 1916. Then the weather was cold in the spring, the snow remained on the ground until about the 8th or 10th April, and it turned very warm, unusually warm for a spring which had been cold, and the snow disappeared in a few days and the water rushed into the lakes; very little was taken up by absorption; it flowed over the frozen ground and ran off much greater in proportion than in the ordinary spring . . . there was very little absorption . . . those conditions are unusual . . . both . . . as to quantity and as to the long duration of the rainy period."

This state of affairs made the water higher than usual, even where there was no dam. It would appear that such a high flood had not before occurred, so far as the memory of those on the spot went; but in 1888 and 1897 the flood was nearly as high; and, in any case, it was to be expected that this concurrence of unfavourable conditions would occur at some time. I can see nothing here to indicate that the flood came under the category of *actus Dei* or *vis major* or that the damage caused to the plaintiff was *damnum fatale*, as the civilians have it, i.e., loss arising from inevitable accident which human means or prudence could not prevent. It is elementary that in our law all loss caused by the act of God must lie where it falls, and be borne by the person on whom the loss or damage has been inflicted.

The argument on the appeal was able and exhaustive; but, in my view, the matter reduces down to a very small compass.

The first attack by the plaintiffs on the defendants' dam was that it was illegal—that failing, it was argued that there was negligence; for the defendants it was contended that the dam was placed and maintained on competent authority, and that their course of conduct was the best under all the circumstances.

Many questions of more or less importance from a constitutional point of view were argued; but I do not think it necessary to consider more than a very few.

The first contention of the plaintiffs, as has been said, is that the dam is a mere trespass, and that the defendants have no right to maintain it because (it is said) it is against the provisions of the Ashburton Treaty of 1842. That treaty is between Her Majesty and the United States of America, and by art. II. it provides: "It being understood that all the water communications and all

App. Div.
1918

SMITH
v.
ONTARIO
AND
MINNESOTA
POWER CO.
LIMITED.
Riddell, J.

App. Div.
1918

SMITH
v.

ONTARIO
AND
MINNESOTA
POWER CO.
LIMITED.

Riddell, J.

the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage from the shores of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries." At the time of the Treaty, the water communications from Lake Superior to the Lake of the Woods and further west were used by fur-traders for the passage of goods, rum, etc., inward, and furs outward—the Grand Portage was at the head of a bay on the shore of Lake Superior, from which a portage of 9 miles led to the widening of the Pigeon River (La Rochefoucault's Travels in Canada, 1795, in the Ontario Archives Report for 1916 (Toronto, 1917), p. 180 *ad fin.*); thence the fur-traders made their way to the Lake of the Woods (or reversely) (Wisconsin Hist. Coll., vol. 11, pp. 123-125, especially 124; p. 579). Of course it was for the advantage of traders of either nation to be allowed to use the waters of the other and for those of the one nation to use the portage on the territory of the other.

It must be obvious that the whole object of this clause is the advantage of those desiring to pass along the waters (and) or the portage: the provision is that such passage shall be free and open. There was no intention to take care of the rights of land-owners or others near the route; and I do not think such persons can appeal to the Treaty as it is sought to do here.

It is said that, had the "water communications" been kept open, this damage would not have occurred; had the damage complained of arisen from interference with the plaintiffs' right to pass along the water communications, the argument would be sound enough (so far as it goes), but such is not the case.

In *Gorris v. Scott*, L.R. 9 Ex. 125, an owner of sheep lost them overboard in the North Sea; he claimed that, had the vessel-owner taken the precautions enjoined by the Privy Council and placed the sheep in pens divided by substantial divisions, they would not have been swept overboard. But the Court held that the pens were intended merely to prevent the spread of infectious disease, and he could not complain of the neglect as failing to prevent infection—failing to prevent falling overboard is quite another matter.

I see no reason for reading the Treaty on any other principle.

In that view, it is necessary to consider only the effect of the

legislation. (Even if the Treaty did apply, I have no shadow of doubt of the power of the United States and Canada, acting together, to abrogate this provision, at least so far as it affects the citizens or subjects of the two countries, and therefore these plaintiffs; but I do not think it necessary to go into reasons in detail.)

The Dominion, under the British North America Act, sec. 91 (10), has jurisdiction over navigation—the Dominion then has jurisdiction to cause or allow any act or work within the Dominion for the advantage of navigation—this dam was considered such a work, and I think the Dominion had jurisdiction in the premises. It may be that the jurisdiction also attaches under sec. 92 (10a.), but that may be less clear.

The Dominion Act respecting the company, 4 & 5 Edw. VII. ch. 139,* requires the plans to be submitted to the Governor-General in Council, and they were submitted accordingly, but explicitly under the general Act.

The statute of Canada in force at the time, R.S.C. 1886, ch. 92, secs. 1 to 9, gives to the Governor in Council authority to approve such a work as is now in question, Parliament retaining the right to vary or annul at any time any order made by the Governor in Council—and the order in council of the 19th September, 1905, is perfectly valid. It may well be that, if the necessary result of constructing the work would be to flood lands, the company might acquire the right to do so without compensation if there were nothing to indicate that compensation was to be paid. But here we find that the applicant, in whose shoes the company stand, takes an order in council based upon the proposition that “a clause in the Act of incorporation of the company . . . makes all damages to lands caused by their works a charge to be borne by them.” If the defence that there was and is no obligation could here succeed, I should think we should retain these cases until an application could be made for the repeal of 4 & 5 Edw. VII. ch. 139, and the revocation of the order in council, or an annulment under R.S.C. 1886, ch. 92, sec. 9. I cannot conceive of this company being allowed to retain the advantage of an order in council if procured by a misstatement of fact. I think, however, we may

App. Div.
1918
—
SMITH
v.
ONTARIO
AND
MINNESOTA
POWER CO.
LIMITED.
—
Riddell, J.

*The Act recites the incorporation of the company by letters patent under the great seal of the Province of Ontario, under the Ontario Companies Act, R.S.O. 1897, ch 191.

App. Div.
1918

SMITH
v.

ONTARIO
AND
MINNESOTA
POWER CO.
LIMITED.

Riddell, J.

read the words above quoted as a condition imposed on the company or a limitation of their then powers. It is quite clear that the order in council was never intended to give the company the power to do damage to lands without paying for it, and I do not think that the words necessarily import such power.

While to determine the intent and objects of an order in council, as of a statute, we can legitimately regard only the language employed, viewed through the light of the surrounding circumstances (*Hollinshead v. Hazleton*, [1916] 1 A.C. 428, at p. 439; *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743, at p. 763), it is a sound rule of construction that an intent is not to be imputed to the Legislature or the Governor in Council to take away or injure any one's property without compensation "unless it be expressed in unequivocal terms. This principle has frequently been recognised by the Courts . . . as a canon of construction, and was approved and acted on by Lord Watson in *Western Counties Ry. Co. v. Windsor and Annapolis Ry. Co.* (1882), 7 App. Cas. 178, at p. 188:" *Commissioner of Public Works (Cape Colony) v. Logan*, in the Judicial Committee, [1903] A.C. 355, at pp. 363, 364; see also *Barrington's Case* (1611), 8 Co. R. 138 a.; *River Wear Commissioners v. Adamson*, 2 App. Cas. 743; *Cannon Brewery Co. v. Central Control Board*, [1918] 2 Ch. 101. Here there is not only no language to express such intention, but the contrary.

I think, therefore, that the company have no power to damage land without paying compensation.

That consideration by no means disposes of these cases. All but two of the plaintiffs are mere squatters on land of the Crown in Ontario, and their rights cannot prevail against the Crown. The agreement of the 9th January, 1905, gives the defendants permission to flood the "lands . . . the property of the Crown in Ontario under the control and administration of the Government of Ontario, and . . . no permission is given . . . to overflow or cause to be overflowed any lands not the property of the Crown in Ontario and not under the control and administration of the said Government" There is nothing anywhere in the Ontario proceedings giving the defendants the right to overflow land not that of the Crown or not under the control and administration of the Crown. As to Tighe and M. H. Smith (who claims

under a locatee, Roach), there can be no pretence that the company are protected by the Ontario proceedings: the others are in a very different position. If the agreement is valid—and it has been recognised by the Legislature: (1906) 6 Edw. VII. ch. 132 (O.)—the defendants have the right to flood the land upon which the squatters' buildings stand, being given such right by the owner. "*Omne majus continet in se minus*;" "*Non debet cui plus licet, quod minus est, non licere*"—he who owns land may do with it what he will—sell, lease, or give it away; and, with such powers, it would be absurd to suppose he could not exercise the lesser power of granting an easement of flowage.

I am unable to see that there can be a valid claim for damages for the exercise on land of rights expressly conferred by the owner, who could himself have exercised these rights. I would therefore allow the appeal as to the plaintiffs other than Tighe and M. H. Smith, and dismiss their actions, but without costs, in view of the facts of the case.

As to Tighe and M. H. Smith I accept the law as laid down in Dom. Proc. in *Greenock Corporation v. Caledonian R.W. Co.*, [1917] A.C. 556: "It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by an extraordinary rainfall, and if damage results from the deficiency of the substitute . . . he will be liable." That indeed is a case of alleged *actus Dei*, but the principle is applicable here. The onus is on the person injured to shew: (1.) that the work "has not been fortified by prescription, and (2.) that but for it the phenomena would have passed him scatheless" (p. 571).

Here there is no pretence of prescription, and I think it has been proved that but for this dam the flood would have passed these two plaintiffs (not indeed wholly, but in part) scatheless.

If the case depended upon negligence, I should not be able to find it. I find nothing in the conduct of the defendants inconsistent with sound sense and prudence. I accept fully the evidence of Prof. Meyer, an engineer of deservedly high repute, and am unable to follow my learned brother Kelly in his animadversions on Fanning. Fanning seems to me to have been trying to avoid being turned into an expert against his will—modesty not too frequent in our Courts.

App. Div.

1918

SMITH
v.ONTARIO
AND
MINNESOTA
POWER CO.
LIMITED.

Riddell, J.

App. Div.
1918

SMITH
v.
ONTARIO
AND
MINNESOTA
POWER Co.
LIMITED.

Riddell, J.

Taking Meyer's evidence after examination at length, it seems to reduce down to what he says on pp. 192 and 193 of the notes of evidence—that, had the dam not been there, the water would have been 1.3 feet (say 1 foot 4 inches) lower—that the defendants are liable for at least 1.3 feet of water. Rolph, also an engineer, says (p. 321) that the water was higher than if there had been no dam, but his evidence is not convincing.

Most of the evidence given is little to the point.

Curiously enough, the plaintiffs thought they had made their case when they proved that the flood was abnormally high (pp. 12, 14, 21, 142, 145, etc.), and the defendants their defence when they had established that the discharge past their dam was greater than in the state of nature—these are of course quite consistent, and neither one nor both can establish a defence or a cause of action. It would appear that part of the damage complained of would have been done had the dam not been in existence, but apparently not all—the plaintiffs M. H. Smith and Tighe are entitled to recover for the difference between the whole and what would have occurred in the absence of the dam: *Nitro-Phosphate and Odam's Chemical Manure Co. v. London and St. Katharine Docks Co.* (1878), 9 Ch. D. 503; *Workman v. Great Northern R.W. Co.* (1863), 32 L.J.Q.B. 279.

While the defendants may suffer from the impossibility of accurately ascertaining the amount (*Leeds v. Amherst* (1850), 20 Beav. 239), the evidence was not directed to an inquiry on such principles, and I am unable to form any satisfactory opinion as to the proper amount to be allowed.

In respect of these two plaintiffs, I would allow the appeal so far as to refer it to the Master to fix the damages, if the parties cannot agree. The costs of the reference and of this appeal may well be left to the discretion of the Master, but the defendants should pay the costs of the action (including the trial before Mr. Justice Kelly), on the Supreme Court scale. No damages should be allowed for anything upon the road allowance, but it appears that Tighe perhaps wholly, and M. H. Smith at least in part, have been flooded as to lands not on the reservation: their damages should be confined to such places.

It may be that these respondents may prefer not to take the reference; they should be at liberty within 30 days to elect not to take it, and, if they so elect, their actions will be dismissed without

costs, and there will be no costs of the appeal to either of the parties.

[A motion was subsequently made by the defendants for a direction that the costs ordered to be paid by them to the plaintiffs M.H. Smith and Tighe should not be payable until after the result of the reference should be known: the Court held that these costs should be paid forthwith after taxation and that the taxation and payment should not be delayed until the determination of the reference.]

[IN CHAMBERS.]

GRAINGER V. ORDER OF CANADIAN HOME CIRCLES.

App. Div.
1918

SMITH

v.

ONTARIO
AND
MINNESOTA
POWER CO.
LIMITED.

Riddell, J.

1918

Nov. 8.

Execution—Judgment Declaring Right to Future Payments—Absence of Direction for Payment or Recovery—Rule 533—Execution Issued upon Judgment after Accrual of Future Payments—Irregularity—Judgment Entered in Conformity with Judgment Pronounced—Supplementary Order for Payment of Sums Accrued Due—Rule 523—Scope of—Effect of Subsequent Legislation and Amendments of Constitution of Friendly Society upon Rights Passed into Judgment—Ontario Insurance Act, R.S.O. 1897, ch. 203, sec. 163, sub-secs. 5 and 6 (3 Edw. VII. ch. 15, sec. 8)—5 Geo. V. ch. 30—7 Geo. V. ch. 99.

The distinction between a judgment that "the defendant do pay to the plaintiff" a sum of money and a judgment that "the plaintiff do recover against the defendant" a sum of money, is obsolete, and a judgment in either form is sufficient to found an execution (Rule 533); but before any execution can issue there must be a judgment directing either payment or recovery of money.

The plaintiff was the holder of a membership certificate in the defendant society (a friendly or benefit society), under which, on attaining the age of 70, he became entitled to \$1,000. By sub-secs. 5 and 6 of sec. 163 of the Ontario Insurance Act, R.S.O. 1897, ch. 203, as enacted by 3 Edw. VII. ch. 15, sec. 8 (O.), the society was permitted to pay the \$1,000 in 10 annual instalments of \$100 each. Five of the payments had been made before this action was brought. The society did not make the sixth payment; and, by the judgment in the action (10th June, 1914), it was declared that the statute was not to be construed as meaning that a member must continue to pay the membership dues during the 10 years, and that the plaintiff was entitled to receive in 1915, 1916, 1917, and 1918, the \$100 *per annum* called for by his contract as varied under the authority of the statute, without payment of any assessment. The judgment directed payment of the \$100 due on the 1st May, 1914: see *Grainger v. Order of Canadian Home Circles* (1914), 31 O.L.R. 461, affirmed (1915), 33 O.L.R. 116. The \$100 awarded by the judgment was paid. The sums declared payable in the subsequent years were not paid, and in 1918 the plaintiff issued a writ of execution therefor upon the judgment:—

Held, that a direction for payment or recovery of these sums could not be implied from the declaration of right, and therefore the execution was irregular.

Held, also, that the judgment as issued was in conformity with the judgment as pronounced.

Held, however, that the plaintiff was entitled to an order by way of supplementary relief, under Rule 523, directing payment of the four sums.

Scope of the Rule considered.

Hoffman v. McCloy (1917), 38 O.L.R. 446, distinguished.

1918

GRAINGER

v.

ORDER OF
CANADIAN
HOME
CIRCLES.

A retrospective statute will not interfere with rights that have already passed into judgment unless the intention of the Legislature so to interfere is clearly expressed: it cannot be inferred from a mere expression of a general retroactive effect.

Re Merchants Life Association (1901), 2 O.L.R. 682, followed.

Therefore the Act 5 Geo. V. ch. 30, which amends the Ontario Insurance Act, R.S.O. 1914, ch. 183, by providing that no person who has become or may become entitled to an instalment under the earlier Act shall be entitled to receive payment unless he continues to be a member of the society and pays his dues, though retrospective in its operation, did not relieve the society from liability.

The plaintiff was not bound to resort for payment to a fund of \$200,000 provided by the society, which had been distributed. By the judgment in appeal, 33 O.L.R. 116, at p. 119, it was decided that the plaintiff was entitled to be paid without discrimination as to the source of payment.

Amendments to the constitution of the society, made in 1915, though intended to be retroactive and to include the plaintiff, could not interfere with the judgment; and there was nothing in an Act respecting the society, passed in 1917, 7 Geo. V. ch. 99, which indicated any intention to interfere with the judgment.

MOTION by the defendants to set aside a writ of execution issued by the plaintiff.

November 5. The motion was heard by MIDDLETON, J., in Chambers.

Norman Sommerville, for the defendants.

I. F. Hellmuth, K.C., for the plaintiff.

November 8. MIDDLETON, J.:—A motion to set aside an execution. On the argument it was agreed that I should deal with the case as though a cross-motion had been made to amend the judgment as not being in conformity with the judgment pronounced, or for an order by way of supplementary relief directing payment of the amounts in question.

Grainger was the holder of a membership certificate in the defendant society, under which, on attaining the age of 70, he became entitled to \$1,000, and a further sum of \$1,000 would become payable on his death.

This contract and many similar agreements were improvident bargains so far as the society was concerned, for the premiums were not sufficient to keep the society solvent, and, as the condition of insolvency did not become manifest until risks began to mature in considerable number and all the earlier maturing claims were met, a condition of great hardship was created. This the Legislature has attempted to mitigate by legislation which has interfered with the contract rights of the policy-holders, a course

objectionable in itself but defensible as being to be preferred to a winding-up of the company, which in cases of this kind means that nothing is realised.

By an Act of the Ontario Legislature passed in 1903, 3 Edw. VII. ch. 15, sec. 8, *the society was permitted to pay the \$1,000 in 10 annual instalments of \$100 each. The contention was then made that the members must continue to pay the membership dues during this 10 years, and so lose not only the interest on the deferred payments but pay sums which, it is said, in this case, exceed the annual instalments.

In this action, brought by Grainger on his own behalf on his own policy, it was declared by the learned Chief Justice of the Common Pleas (*Grainger v. Order of Canadian Home Circles* (1914), 31 O.L.R. 461) that this was not the effect of the statute upon the agreement, and that Grainger was entitled to receive the \$100 *per annum* during the years 1915, 1916, 1917, and 1918, called for by his contract as varied under the authority of the statute, without payment of any assessment. Judgment was given for the \$100 due on the 1st May, 1914.

This judgment was pronounced on the 10th June, 1914, and was carefully settled before the learned Chief Justice. It merely

Middleton, J.

1918

GRAINGER

v.
ORDER OF
CANADIAN
HOME
CIRCLES

*The statute is intituled "An Act to Amend the Insurance Act," and was assented to on the 12th June, 1903. By sec. 8, sec. 163 of the Ontario Insurance Act, R.S.O. 1897, ch. 203, is amended by adding thereto sub-secs. 5 and 6 as follows:—

(5) Where by the constitution and laws of any friendly society registered under this Act provision is made for the payment of an ascertained or ascertainable sum to a member of the society in the event of his becoming totally disabled, or of his reaching a stated age, or (if so stipulated) upon the concurrence of both events, whether such provision is combined with other life insurance or not, such society may so amend its constitution, laws, rules and regulations as to provide for the payment of the said sum in equal consecutive annual instalments without interest, the payment of such instalments to be completed within a period not exceeding ten years from the happening of the event; and all such amendments which have heretofore been or which may be hereafter passed by any such friendly society pursuant to the provisions of its constitution and laws as to amendments, shall be and the same are hereby declared valid and binding upon all its members and upon all their beneficiaries and legal personal representatives and upon every one in any wise entitled, the declaration or articles of incorporation of such society or the previous provisions of its constitution and laws to the contrary notwithstanding.

(6) In the event of the death of a member of such society after becoming totally disabled, or reaching the stated age, or both, but before payment of all the said instalments, the instalments unpaid shall form part of the insurance moneys or benefits payable upon the death of such member, and shall be paid and distributed in accordance with the direction, declaration or apportionment made by such member in that behalf subject to the provisions of this Act.

Middleton, J.

1918

GRAINGER

v.

ORDER OF

CANADIAN

HOME

CIRCLES.

declares the right as to the payments falling due in 1915, 1916, 1917, and 1918, and does not contain either a direction or order or judgment for payment, nor does it direct that the plaintiff shall recover against the defendants the sums in question.

Under former practice there was a wide distinction between a judgment that "the defendant do pay to the plaintiff" and a judgment that "the plaintiff do recover against the defendant" the same sum. The former order would be followed by an attachment.

This distinction is now obsolete, and either form of judgment is sufficient to found an execution: see Rule 533; but before any execution can issue there must be a judgment either directing payment or recovery of the sum named.

This cannot be implied from the mere declaration of right.

The execution, in my view, is irregular.

Then, on the cross-motion, I cannot say that the judgment as issued was not in accordance with the judgment pronounced. The relief now asked was not sought by the pleadings and was not discussed by the learned Judge.

So far as the application is based upon Rule 523,* I think I can and ought to entertain it and consider the effect of the legislation which the defendants say has relieved them from liability.

Hoffman v. McCloy (1917), 38 O.L.R. 446, 33 D.L.R. 526, shews that Rule 523 cannot be invoked for the purpose of giving effect to a new cause of action arising subsequent to the cause of action sued upon, merely because it is similar to that actually dealt with in the action. Here the Court has not only dealt with the claim for the \$100 which accrued before the action was brought, but has made a declaration which determines the right of both parties as to the growing instalments of the annuity, unless, as is contended, this right has been displaced by the subsequent legislation. To refuse to implement this declaratory judgment by now directing payment of the sums falling due in the 4 years

* 523. A party entitled to maintain an action for the reversal or variation of a judgment or order, upon the ground of matter arising subsequent to the making thereof, or subsequently discovered, or to impeach a judgment or order on the ground of fraud, or to suspend the operation of a judgment or order, or to carry a judgment or order into operation, or to any further or other relief than that originally awarded, may move in the action for the relief claimed.

since the judgment, would be unduly to narrow the scope of the Rule.

The defendants contend that three things which have happened since the judgment discharge them from liability:—

(1) An Act, (1915) 5 Geo. V. ch. 30,* which changes the law and provides that no person who has become or may become entitled to an instalment under the earlier Act shall be entitled to receive payment unless he continues to be a member of the society and pays his dues.

Had this Act been in force when the action was tried, no doubt it would have governed, and would have precluded the pronouncing of the judgment given.

No doubt, also, the statute is in such form that it is retrospective in its operation.

But a retrospective statute will not interfere with rights that have already passed into judgment unless the intention of the Legislature so to interfere is clearly expressed. It cannot be inferred from a mere expression of a general retroactive effect.

This rule was given effect to in a case very similar to the present: *Re Merchants Life Association* (1901), 2 O.L.R. 682. See also *per* Bowen, L.J., *Reid v. Reid* (1886), 31 Ch.D. 402, at pp. 408, 409.

(2) The second ground relied on is the distribution of a fund of \$200,000 under the supervision of the Inspector, in accordance with some undertaking given when the legislation of 1915 was applied for. This would have been serious if this fund had been the fund to which the plaintiff was bound to resort. By the judgment upon appeal (*Grainger v. Order of Canadian Home Circles* (1915), 33 O.L.R. 116, 21 D.L.R. 110), it is stated that the defendants asked that the judgment be varied so as to provide that payment should only be made from that fund. This was expressly refused, and it is said that the plaintiff is entitled to enforce payment against the defendants "without discrimination as to its source" (33 O.L.R. at p. 119 *ad fin.*)

(3) Then, amendments to the constitution were made in 1915, intended to be retroactive and to include the plaintiff. No such domestic legislation could interfere with a judgment pronounced,

Middleton, J.

1918

GRAINGER
v.

ORDER OF
CANADIAN
HOME
CIRCLES

*An Act to amend the Ontario Insurance Act, R.S.O. 1914, ch. 183.

Middleton, J.

1918

GRAINGER

v.

ORDER OF
CANADIAN
HOME
CIRCLES

for the reasons already given and other obvious reasons. The rights had ceased to be a mere incident of membership, and the plaintiff had as to these rights become a creditor and a judgment creditor of the society.

It is said that these amendments were confirmed by an Act passed in 1917, an Act respecting the defendant society, 7 Geo. V. ch. 99. I cannot give to this Act any such wide effect. It was intended to confirm the mode of distribution of the \$200,000 fund, which had been declared to be in conflict with the provisions of the law, and to avoid the consequences of such error. I cannot find anything indicating any intention to interfere with the judgment pronounced in this action.

The result is, that the execution must be set aside, and an order now be made for payment of the amounts with interest.

As success is divided, it will probably be fair to give no costs.

1918

[APPELLATE DIVISION.]

July 20.
Nov. 11.

MOLSONS BANK v. CRANSTON.

Guarantee—Loan by Bank to Commercial Company—Agreement of Directors of Company to Guarantee Repayment—Execution of Bond by all Directors but one—Condition as to Execution by all—Knowledge of, by Manager of Bank—Advance of Part of Sum upon Uncompleted Instrument Delivered to Manager—Circumstances Shewing Conditional Delivery—Escrow—Provision in Bond that Individual Signers Bound notwithstanding Non-execution by others—Provision not Operative till Execution Complete—Effect of Delivery to Oblige, not to Stranger—Personal Liability of one Director from Conduct—Estoppel—Duty to Bank—Knowledge of Condition.

A commercial company applied to the plaintiff bank for a loan of \$15,000; the application was accepted upon certain terms, one being that all the directors of the company should guarantee the repayment of the loan. All the directors agreed to execute and all but one (F.) did execute a guarantee-bond, some of them saying when they executed it that they did so upon the condition that all should execute. The bond was delivered to the local manager of the bank, who knew of the condition, and undertook to get F.'s signature. The manager advanced \$8,000 of the bank's money, without F.'s signature, being willing, as he (the manager) said, to "take a chance." Subsequently F. refused to sign, and this action was brought against those who did sign to recover the amount advanced. One of the clauses in the instrument was: "This guarantee shall be binding upon every person signing the same, notwithstanding the non-execution thereof by any other proposed guarantor:"—

Held, upon the evidence, that the delivery of the instrument to the manager was a conditional one.

In order to make a sealed instrument operate as a mere escrow it is not now necessary that express words be used: what would otherwise be an absolute delivery may be restricted by evidence of the surrounding circumstances shewing that only a conditional delivery could have been intended.

Trust and Loan Co. v. Ruttan (1877), 1 Can. S.C.R. 564, 583, followed.

But in this case it was necessary to shew more than that the circumstances pointed to a conditional delivery. Express and clear notice was necessary to prevent the delivery of the document from taking immediate effect, because its terms shewed that it was intended to come into effect as to each party as soon as he put his hand to it. Such a notice had been established here, and the conclusion that the delivery was conditional only, and that the guarantee never became effective as against any of the parties, followed. The clause above quoted was not binding on any one unless and until the document itself became operative.

Carter v. Canadian Northern R.W. Co. (1911), 24 O.L.R. 370, distinguished.

When the bond was finally handed to the manager, he undertook to get F.'s signature, and so held it as the agent of all parties until the time when, if he got that signature, he could properly retain it for the bank.

The ancient rule that the delivery of a document as an escrow must be to a stranger has not survived.

Watkins v. Nash (1875), L.R. 20 Eq. 262, *London Freehold and Leasehold Property Co. v. Baron Suffield*, [1897] 2 Ch. 608, and *Scandinavian American National Bank v. Kneeland* (1914), 8 W.W.R. 61, followed.

The defendant B., who brought the bond to the manager and left it with him and received \$8,000 for the company, stood in no different position from his co-defendants—he did not make himself personally liable for the amount advanced.

The bank, through its manager, was all along aware of the condition; and, therefore, if any duty to disclose it might have existed in other circumstances, its performance by B. would not have informed the bank of anything it did not know already.

Ewing v. Dominion Bank (1904), 35 Can. S.C.R. 133, distinguished.

AN action upon a bond executed by the defendants in favour of the plaintiff bank to guarantee the indebtedness to the bank of a certain company.

The action was tried by BRITTON, J., without a jury, at a Belleville sittings.

Stewart Masson, K.C., and *A. Abbott*, for the plaintiff bank.

M. H. Ludwig, K.C., and *B. W. Essery*, for the defendants Cranston, Feighen, Wills, and Brownridge.

F. E. O'Flynn, for the defendants Connelly, Farley, and White.

July 20. BRITTON, J.:—This action is brought by the plaintiff against the defendants as guarantors for payment of the indebtedness of the Canadian National Features Limited, the amount of the claim being \$15,000 and interest, under an agreement made between the plaintiff and defendants, dated the 1st March, 1917.

The Canadian National Features Limited, shortly before the 1st March, 1917, were doing business in the town of Trenton. The citizens of Trenton had expectations of great benefit from that company in its operations, if successful; but the company at the time mentioned required more money than it had available,

1918
—
MOLSON'S
BANK
v.
CRANSTON.

Britton, J.

1918

MOLSONS

BANK

v.

CRANSTON.

or than there was any prospect of its getting very soon, whether from the sale of stock or from customers.

The directors expressed a willingness to come to the rescue of the company, to prevent the company being wound up, and so decided to assist the company by raising upon their credit the sum of \$15,000. For this purpose a meeting was called, and it was attended by all the directors of the said company.

A bond or agreement to guarantee the payment of \$15,000, the amount they promised to assist the company to raise, was to be signed by the directors and given to the plaintiff bank.

An application for a loan was first made to the Standard Bank at Trenton, but that bank declined to make it. Then followed the application to the plaintiff bank, through Mr. Webb, the manager at Trenton, which was accepted, as alleged, upon certain terms agreed upon—the chief one was that the proposed guarantee should be signed by all the directors. At the early part of the meeting Dr. F. J. Farley was present, and he agreed with the others to become one of the guarantors.

The matter was taken up by Mr. Webb, and he drew up the agreement on one of the usual forms kept by the bank for loans such as the one in question. This guarantee-agreement was signed by all the directors of the company except Dr. Farley; and Mr. Webb, without obtaining Farley's signature, advanced the money. The company gave its note for \$15,000.

There was default in the payment of the note, and this action is now brought upon the guarantee-agreement, against those who signed it.

Farley, after the meeting, refused to sign.

The defence is that there was an agreement between the guarantors that unless all, including Farley, signed, the guarantee was not to be operative.

It is alleged that Mr. Webb knew of this agreement, and accepted the guarantee as an escrow, he agreeing that the bank would not advance the money until all the directors had signed.

Mr. Webb made strong effort to procure the signature of Farley, but without avail.

The questions for consideration are: Was there such an agreement between the signers of the guarantee-bond as stated? Was the plaintiff bank aware of such an agreement? And did the

manager promise that the bond would not be made operative by the bank unless all the directors signed it?

There can be no reasonable doubt, upon the evidence, that the directors among themselves understood and agreed that, unless all signed, the bond was not to be operative. The clearest evidence as to the bank's knowledge of the agreement was that given by Mr. White. Mr. White gives reasons why he could not be mistaken and why he has so clear a recollection of the language used. He stated that Mr. Young asked him if he intended to sign, and he replied that he did not know and would have to see the bank-manager first, and that his object in seeing the manager was to ascertain whether or not his signing would in any way lessen or interfere with his line of credit at the bank, he being a customer of the bank. He made two or three efforts to see the manager, and also used the telephone. He finally saw the manager, and the manager told Mr. White that he ran no risk in signing because the bank had collateral notes to a large amount, and that the signers of the bond would be liable to the extent of \$15,000.

The manager further said to White that the bond would be signed by all the directors, and would not be used by the bank till all the directors had signed.

Looking at the correspondence between the manager and the head of the bank, and considering all the evidence that was given, I must find that the plaintiff had knowledge of the agreement between the directors, and that this bond was not to be used until all the directors had signed. It was argued by counsel for the plaintiff that such an agreement and such knowledge of the bank should not avail, because of the form of the bond, which, in addition, among many other things, provides for the protection of the bank as follows:—

“This guarantee shall be binding upon every person signing the same, notwithstanding the non-execution thereof by any other proposed guarantor.”

The defendants' counsel concede that, if the bond once became operative in favour of the bank, all the conditions and provisions would be available for the bank; that this bond was held only in escrow by the bank, and so could not be used or be held by the bank until the condition, upon which it was given to the bank, was complied with.

Britton, J.

1918

MOLSONS
BANK
v.
CRANSTON.

Britton, J.

1918

MOLSONS
BANK
v.

CRANSTON.

It is well-settled law that an agreement contemporaneous with a written one may be entered into, to prevent the original agreement from being operative until the happening of some event or until some future time to be named.

In *Pym v. Campbell* (1856), 6 E. & B. 370, it was held that an agreement complete between the parties as to terms etc., but subject to the approval of a third person, could not be enforced without the approval of the third person, that is, that an original agreement was not binding if it was held only as an escrow.

In *Wallis v. Littell* (1861), 11 C.B.N.S. 369, there was an agreement for sale, but this agreement was made subject to the condition that it should be void unless within a reasonable time after the making of the agreement Lord Sydney should consent and agree to the transfer of the farm to the plaintiff; and it was held that it was competent to the defendant to prove by extraneous evidence this contemporaneous oral agreement, operating as a suspension of the written agreement, and not in defeasance of it.

See also *Pattle v. Hornibrook*, [1897] 1 Ch. 125. This is an important case and supports the defendants' contention.

The cases above mentioned were reviewed by Mr. Justice Kelly in *Dominion Bank v. Cameron* (1918), 13 O.W.N. 420. Several other cases favourable to the defendants are also cited.

The difference between that case and this is only in the fact that the learned Judge held that there was no notice to or knowledge by the bank of the agreement mentioned.

In this case the proof as to direct communication to the plaintiff of the agreement relied upon is, in the main, that given by Mr. White. It is not argued that there would be liability on the part of those of the directors who knew of the agreement between themselves, but did not otherwise know that the plaintiff was aware of such an agreement.

My decision is, that the plaintiff's knowledge of the agreement that the guarantee was not to be operative unless signed by all, is available as a defence for all the defendants.

Judgment will be for the defendants, dismissing the action against all of them, but such judgment will be without costs.

The plaintiff bank appealed from the judgment of BRITTON, J.

October 24 and 25. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

I. F. Hellmuth, K.C., and *A. Abbott*, for the appellants, argued that the case was governed by the principles of law set out in *Carter v. Canadian Northern R.W. Co.* (1911), 24 O.L.R. 370, 376, reversing the decision in 23 O.L.R. 140. Evidence of the alleged parol agreement among the directors of the company should not have been admitted, as it contradicts an express term of the guarantee, which provided that it should be binding upon every person signing the same, notwithstanding the non-execution thereof by any other proposed guarantor. They also referred to *Anning v. Anning* (1916), 38 O.L.R. 277; *Great Western Railway and Midland Railway v. Bristol Corporation* (1918), 87 L.J. Ch. 414, *per* Lord Atkinson at p. 418 *et seq.*, and cases there cited; *Ewing v. Dominion Bank* (1904), 35 Can. S.C.R. 133. As to the claim that the document was an escrow, the defendants have failed to meet the onus which lay on them to shew non-delivery. Apart from the question of law, the Court should reverse the finding of the trial Judge with regard to the credibility of certain witnesses, with which he had not dealt specifically.

M. H. Ludwig, K.C., *F. E. O'Flynn*, and *B. W. Essery*, for the several defendants, respondents, relied upon the judgment of the trial Judge, and argued that there was no ground for interfering with his view as to the weight of evidence, which he considered to be in favour of the defendants. They referred to *Scandinavian American National Bank v. Kneeland* (1914), 8 W.W.R. 61.

Hellmuth, in reply.

November 11. The judgment of the Court was read by HODGINS, J.A.:—The chief argument addressed to us was that parol evidence of a condition that all those present at the first meeting in Trenton should sign before the bond sued on became operative, was inadmissible. This was founded upon a provision in the instrument that the individual signers should be bound notwithstanding the non-execution by any other proposed guarantor.

There is a plain answer to this contention. It is that the clause relied on is not binding on any one unless and until the document

App. Div.
1918

MOLSONS
BANK
v.
CRANSTON.

App. Div.
1918

MOLSON'S
BANK

v.

CRANSTON.

Hodgins, J.A.

itself becomes operative. The rule against contradicting a written document applies, of course, only to an agreement which has actual vitality, and not to one which is in a state of suspended animation, ineffective and undelivered. No such rule of evidence can be set up until the legal relation of the parties has been established; and, if the condition relied on is unfulfilled, the whole agreement fails.

I think the evidence supports the position that the delivery was a conditional one.

It is true there is a conflict of evidence between Webb, the local agent of the appellant, and Brownridge and White, who are relied upon to bring notice home to the bank. The bank itself treated the document as incomplete, and, when its head office learned that Dr. Farley had not signed it, dismissed its agent. This is not conclusive, but is a circumstance to be considered, when discussing the weight to be given to the agent's evidence. He must, in submitting the matter, have made mention of all who were to sign, and his failure to obtain one signature was considered as a non-completion of the terms of the application.

The evidence as to the signature is as follows: The bond was signed by White, Connelly, and Brownridge, in the office of Young, manager of the Standard Bank in Trenton. Then Brownridge took it away and sent it to Toronto, where Cranston and Feighen executed it, as did Regan and Wills, who had charge of it. These four were all together when they signed. Cranston signed upon the condition, which he expressed to the three others at the time, that the bond was not to be used till all the directors had signed. He noticed the absence of Dr. Farley's name. He also relates the proceedings at the original meeting, in Trenton, of the persons interested, when all agreed to go on the bond, including Dr. Farley. Feighen and Regan corroborate this evidence and add that they too mentioned the absence of Dr. Farley's signature and expressed themselves as only signing upon the same condition as stated by Cranston. Regan read the bond and noticed the word "individually," but says that that was only operative if the bond got to the bank, and that it should never have reached the bank until Dr. Farley's signature was there. Wills was not called. When the bond was returned from Toronto, Brownridge got it and gave it to Young to get Dr. Farley's signature, with instructions not

to deliver it till that was done. He recalls the telephone conversation with Wills, as stated by Regan, in which he was told of the conditional signing by the Toronto parties. Connelly made the condition, when he signed it in Young's presence, that it was not to be used till all were on it. White says he was assured by Webb to the same effect, and that he signed it shortly afterwards, in Young's presence. These statements he stoutly reaffirms on cross-examination.

White learned a few days after he had signed the bond that Dr. Farley had not signed, but admits that he did not give notice to the bank repudiating liability, though he knew that part of the money, perhaps the greater part, had been received by the company. He says he considered that this had been done contrary to the agreement with Webb. He finds it difficult to account for his previous statement that there was no agreement apart from the document itself, but excuses himself by saying that his present evidence is "more mature" in that he has had time to think it out since.

Brownridge heard from Webb that the appellant's head office had accepted the loan, and was asked by him for the bond. He then told Webb it was in Young's hands, uncompleted, waiting Dr. Farley's signature. He was asked to go for the bond, and did so, after telling Webb that it was not to be used till Dr. Farley had signed it. He further says that Webb, when he got the bond, said he would "take a chance on getting Dr. Farley to sign it." He then got \$8,000 from Webb, and went to New York with it. He admits having heard the application to the head office read over to him by Webb before it went in, and that he "possibly overlooked the point of 'individually,' and that his distinct understanding was that it was 'collectively.'"

The learned trial Judge has credited Brownridge and White as against Webb, whose evidence is not quite as satisfactory as it might be, having regard to the statement made in his letter to the head office and the admissions he makes. These raise some doubt as to whether his sweeping denials are not due to a wish to clear himself from a suspicion that he thought the business good and desired to get it through, irrespective of Dr. Farley's default.

App. Div.
1918
MOLSONS
BANK
v.
CRANSTON.
Hodgins, J.A.

App. Div.
1918

MOLSONS
BANK

v.

CRANSTON.

Hodgins, J.A.

As early as 1821, the Court of King's Bench, in *Johnson v. Baker*, 4 B. & Ald. 440, decided as follows:—

“Before the execution of a composition-deed, it was agreed, in the presence of the surety for the payment of the composition, that it should be void unless all the creditors executed it. The surety, at the same interview, afterwards executed the deed in the ordinary way, without saying anything at the time of execution. The deed was then delivered to one of the creditors, in order that he might get it executed by the rest of the creditors:—Held, that this was to be considered a delivery of the deed as an escrow, and that all the creditors not having executed it, the surety was not bound.”

In *Bowker v. Burdekin* (1843), 11 M. & W. 128, the Exchequer Chamber laid down a rule, which has since been widely adopted, in these words, *per Parke, B.*, p. 147:—

“In this case the execution of the deed was proved in the ordinary form, and I take it now to be settled, though the law was otherwise in ancient times, as appears by Sheppard's Touchstone, that in order to constitute the delivery of a writing as an escrow, it is not necessary it should be done by express words, but you are to look at all the facts attending the execution,—to all that took place at the time, and to the result of the transaction; and therefore, though it is in form an absolute delivery, if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow. That is the result of the two cases cited in argument, *Johnson v. Baker* and *Murray v. Earl of Stair*.”*

This case was followed in Ontario in 1868 in *Corporation of Huron v. Armstrong*, 27 U.C.R. 533, a case against sureties, and by the Supreme Court of Canada in *Trust and Loan Co. v. Ruttan* (1877), 1 Can. S.C.R. 564. In the latter case Strong, J., gives his view thus (p. 583):—

“Although it was formerly essential to make a sealed instrument operate as a mere escrow that express words should be used, such is not now the state of the law, and what would otherwise be an absolute delivery as a deed may be restricted by evidence of the surrounding circumstances shewing that only a conditional

**Murray v. Earl of Stair* (1823), 2 B. & C. 82.

delivery could have been intended. Numerous cases, some of which I refer to below, shew this."

I do not think this has been departed from in any later case.

While these cases give the general rule permitting a reasonable inference to be drawn in the absence of express words of condition, I have found nothing dealing with the difficulty met with here.

The guarantee sued on provides for the exact situation which has arisen, and if it were operative would control it, as it makes each individual liable, even though others failed to do what was expected of them.

Something more, then, is necessary, if the desired inference is to be drawn, than the fact that the circumstances point to a conditional delivery. Express and clear notice should be required to prevent the delivery of a document, such as the present, from taking immediate effect, because its very terms shew that it is intended to become effective as to each party as soon as he puts his hand to it.

Such a notice, in my judgment, has been established here, and the conclusion follows that the delivery was conditional only, and that the guarantee never became effective as against any one of the parties.

The case which is nearest to this one was cited on the argument, namely, *Carter v. Canadian Northern R. W. Co.*, 23 O.L.R. 140, 24 O.L.R. 370. The feature which distinguishes it from this case is that the agreement was a complete one and had been acted on. The evidence went to prove a defeasance of this completed agreement, and the learned Chief Justice of Ontario, Sir Charles Moss, says (p. 376) that it could not be given effect to without contradicting the written agreement and depriving the defendants of the right to cancel it in a certain event, which the agreement gave to them and to them only.

Anning v. Anning (1916), 38 O.L.R. 277, 34 D.L.R. 193, also cited, failed on the facts. In *Great Western Railway and Midland Railway v. Bristol Corporation*, 87 L.J. Ch. 414, nothing is dealt with by the House of Lords except the rules of evidence regarding the meaning of a particular phrase, "traffic for the year."

Two other questions were argued. It was said that delivery to Webb was delivery to the bank, i.e., the party to take the benefit under the contract, and that no escrow could be established under those circumstances.

App. Div.
1918

MOLSONS
BANK
v.

CRANSTON.

Hodgins, J.A.

App. Div.
1918

MOLSONS
BANK

v.

CRANSTON.

Hodgins, J.A.

The ancient rule on the subject has not survived. In *Miller-ship v. Brookes* (1860), 5 H. & N. 797, the Court of Exchequer were all of opinion that the deed was delivered only as an escrow, where it was sealed and delivered to an attorney who was acting for all parties to it. It was delivered to the attorney to obtain another signature.

In *Watkins v. Nash* (1875), L.R. 20 Eq. 262, Vice-Chancellor Hall, in a much-quoted judgment, states the modern view in these words (p. 266):—

“But it is said that the deed thus executed could not be an escrow, because it was not delivered to a stranger; and that is, no doubt, the way in which the rule is stated in some of the text-books—Sheppard’s Touchstone, for instance; but when those authorities are examined, it will be found that it is not merely a technical question as to whether or not the deed is delivered into the hands of A.B., to be held conditionally; but when a delivery to a stranger is spoken of, what is meant is a delivery of a character negating its being a delivery to the grantee or to the party who is to have the benefit of the instrument. You cannot deliver the deed to the grantee himself, it is said, because that would be inconsistent with its preserving the character of an escrow. But if upon the whole of the transaction it be clear that the delivery was not intended to be a delivery to the grantee at that time, but that it was to be something different, then you must not give effect to the delivery as being a complete delivery, that not being the intent of the persons who executed the instrument. As regards the instrument in question, it might very well, under the circumstances, be meant and taken to be a delivery by Watkins to Collins, to be held by him for the purpose of being delivered over to the grantee when the transaction was complete. I see no difficulty whatever in that view being adopted.” Collins, referred to above, was the solicitor of the grantee.

In *London Freehold and Leasehold Property Co. v. Baron Suffield*, [1897] 2 Ch. 608, the point was expressly raised. In the course of the judgment (pp. 621, 622), Lindley, M.R., said:—

“Counsel for the defendants contended that the mere fact that Wynne was himself one of the mortgagees was fatal to the deed being an escrow. They contended that to be an escrow the deed must be delivered to some person not a party taking under

it; in short, to a stranger. In support of this contention reliance was placed on Co. Litt. 36a; Sheppard's Touchstone, 7th ed., pp. 58, 59; and *Whyddon's Case* (1596), Cro. El.z. 520. No doubt the language used in the authorities referred to and reproduced in other works on real property and conveyancing is in favour of this contention. But the language is very general, and we are not at all satisfied that the law is so rigid as to compel the Court to decide that where there are several grantees and one of them is also solicitor of the grantor and of the other grantees, and the deed is delivered to him, evidence is not admissible to shew the character in which and the terms upon which the deed was so delivered. To exclude such evidence appears to us unreasonable; and we do not think we are compelled by authority to exclude it. We hold such evidence to be admissible, and in so doing we believe we are acting in accordance with modern authorities, beginning with *Murray v. Earl of Stair* and ending with *Watkins v. Nash*."

The Supreme Court of Canada had to consider, in *Scandinavian American National Bank v. Kneeland*, 8 W.W.R. 61, an appeal from the Court of Appeal for Manitoba in a case somewhat similar to this one. The bond signed by all but Chase was left with Grandin, the agent of the bank. Idington, J., refers to the evidence thus (p. 73):—

"It was so clearly the purpose and understanding of all concerned that the guarantee was to be given by those who met and agreed to sign for the respective sums equal to the stock each held, that I am of the opinion no one had the right to act on the signature of any less number. It would be giving Mr. Grandin so much less credit for intelligence than I think is his due to attribute to him the conviction or belief that he would have had the right to hold that document merely as against appellant if all the others had failed to sign after he had left the bank and document there and had gone home, that I cannot credit him when he tries to induce the belief that in the absence of a negative term covering such ground he had apparently such right."

Anglin, J. (p. 77), makes a remark quite applicable to this case:—

"Upon the evidence explicitly credited by the trial Judge, if there was not an express agreement on the part of the bank with Kneeland, that the guarantee executed by him should not be

App. Div.
1918

MOLSONS
BANK
v.

CRANSTON.

Hodgins, J.A.

App. Div.
1918
MOLSONS
BANK
v.
CRANSTON.
Hodgins, J.A.

operative until, and unless, signed by the other proposed guarantors, Richardson, Berge, Hedwall, and Chase, it is clear that the bank-manager took the guarantee from Kneeland with knowledge that this was his understanding of the condition on which he assumed liability as surety The question at issue is surely one of fact. The evidence upon it is conflicting. The judgment of the learned trial Judge shews that he exercised the greatest care in weighing the credibility of the several witnesses. His finding rests wholly upon his acceptance of the story told by Kneeland and his rejection of that of Grandin where it conflicts with Kneeland's evidence. Cases are rare in which such a finding can properly be disturbed on appeal."

I read the evidence as establishing that when the bond was finally handed to Webb, he undertook to get Dr. Farley's signature, and so held it as the agent of all parties until the time when, if he got that signature, he could properly retain it for the bank.

I do not see that Brownridge really stands in any different position from his co-defendants. He, it is true, brought the bond to Webb and left it with him and received \$8,000 for his company at the time. But, if he is believed—and I see no reason for discrediting him—Webb was then informed of the condition, if not already aware of it, and determined to "take a chance" with the bond in its imperfect state. Taking a chance meant advancing money with knowledge that no one was yet bound, and, if so, it cannot be said that Brownridge was held individually. He knew the bank had other collaterals, and, if the manager was willing to risk getting the signature, his taking the cash cannot make him liable unless liability can arise because he took the bank's money knowing that it was being advanced contrary to the understanding with the head office. His company was profiting by Webb's improper action, but I can see no principle upon which can be rested the conclusion that from what occurred Brownridge made himself personally liable to the bank for the amount then advanced.

There is no ground for applying the doctrine of *Ewing v. Dominion Bank*, 35 Can. S.C.R. 133, to this case. The bank, through Webb, was all along aware of the condition; and, therefore, if any duty might have existed under other circumstances, its performance here would not have informed the appellant of anything it did not know already.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

1918

Nov. 14.

MILLS V. CONTINENTAL BAG AND PAPER CO.

Contract—Excavation Work—Payment for, at Price per Cubic Yard—Exception—“Rock”—Removal of Boulders—Inclusion in Exception—Evidence—Local Custom—Explanation of Meaning of Doubtful Words.

The plaintiff agreed with the defendants to “do the excavating of all materials, excepting rock,” under the defendants’ building, at a named price per cubic yard for all materials removed. In the course of the work, the plaintiff encountered large boulders and removed them:—

Held, that “rock” should, in the circumstances of the case, be considered as having its usual meaning, including, according to the dictionaries, a large stone or boulder; and the plaintiff was entitled to extra remuneration for removing the boulders which he encountered.

Drhew v. Altoona City (1888), 121 Penn. St. 401, 421, approved.

Held, also, that evidence as to the practice and custom in the city where the work was done was inadmissible because it did not profess to conform to the rule governing evidence explanatory of the meaning of doubtful words, nor to that relating to custom.

AN appeal by the plaintiff from the judgment of GUNN, Jun. Co. C.J., dismissing without costs an action brought in the County Court of the County of Carleton to recover \$659.90 for excavating rock for the foundations of a building erected for the defendants.

The plaintiff was a contractor, and he agreed to do the excavating of all materials, “excepting rock.” He claimed extra payment for removing certain large boulders; and the question in the action, which the trial Judge decided in favour of the defendants, was whether these boulders were or were not “rock” within the meaning of the agreement.

October 24. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

E. P. Gleeson, for the appellant, argued that the contract between the parties did not include the cost of excavating rock, and that term should include the large boulders removed by the plaintiff, although they were not stratified. A witness called by the defendants as an expert had said that “rock” must be stratified, but was unable to say within what limits that was the case, and the word should receive its usual meaning as defined by the standard dictionaries. The last receipt given to the defendants could not be regarded as a settlement of the claim; it was merely a receipt on account, similar to others previously given. He referred to *Drhew v. Altoona City* (1888), 121 Penn. St. 401, 421.

App. Div.
1918
MILLS
v.
CONTIN-
ENTAL
BAG AND
PAPER CO.

W. L. Scott, for the respondents, the defendants, argued that the last receipt was evidence of the settlement of the account. The boulders for which extra payment was claimed might have been buried, and the architect says it was unnecessary to blast them as the plaintiff did, and he did not order this to be done. The earth to be excavated was all glacial drift, in which boulders are always found, and was clearly not "rock" as properly defined. The case cited by the plaintiff did not involve the question at issue here. He referred to *Okey v. Moyers* (1902), 91 N.W. Repr. (Iowa) 771. Boulders are stones, not rock, and are so treated by the custom of contracting parties in Ottawa.

Gleeson, in reply, referred to *Anderson v. Fitzgerald* (1853), 4 H.L.C. 484, 507, as to ambiguous expressions in contracts being taken most strongly against the party using them.

November 14. The judgment of the Court was read by HODGINS, J.A.:—Appeal from judgment of Gunn, Co.C.J., who dismissed the action without costs.

The appellant was a contractor, and agreed to "do the excavating of all materials, excepting rock, under the entire factory building of the owners (in) Ottawa and remove same from the premises, disposing of same as he may see fit."

The price was to be "\$1 per cubic yard for all material removed by the said contractor."

During the work, the appellant encountered large boulders and removed them, and this claim is for payment of the cost thereof, upon the ground that the contract did not include them. The appellant says that, when he encountered these boulders, weighing from 1,700 to 7,500 lbs., he went to the respondents' architect, and said they could not be excavated at the contract price, but were worth three times the cost of earth excavation, and was instructed to proceed, and told that he would be treated well—and would be paid. He repeats this, and the architect will not contradict him, saying however that he "has no recollection of making such a statement." The appellant's story is corroborated by what was done when the final certificate was issued. That certificate was, according to the architect, for more cubic yards than the excavation really measured, and also included the space occupied by the piers. This was to compensate the appellant for

the general difficulty he had in doing the work, removing boulders and pieces of boards and old roots. In addition to this, the architect gave him a letter to the owners recommending them to give him a bonus of \$150, the place being exceptionally hard to work in, on account of the piers, and "also on account of the large number of heavy boulders which he encountered as the work proceeded."

The learned County Court Judge says he rather inclines to the appellant's story as to the statement he says was made to him by the architect, but dismisses the action because he concludes that boulders are not "rock" as that word is used in the contract. He properly discards the evidence given as to the practice and custom prevailing in Ottawa or followed under contracts which specifically classify material. None of it was admissible because it did not profess in any way to conform to the rule governing evidence explanatory of the meaning of doubtful words, nor to that relating to custom.

I think the word "rock" must, under the circumstances of this case, be considered as having its usual meaning. "Rock" was not to be excavated—and this word, according to the dictionaries, includes stratified as well as loose rock. The Imperial Dictionary in 1859 gives it as meaning "a large mass of stony matter . . . bedded in the earth or resting on its surface." Murray's Dictionary, 1914, calls it "a large detached mass of stone; a boulder." The Century Dictionary, 1911, defines it as "a mass, fragment, or piece of that crust (of the earth), if too large to be designated as a stone, and if spoken of in a general way without special designation of its nature." This dictionary says that a stone is "a piece of rock of small or moderate size."

The Encyclopædia Britannica practically adopts the definition of rock just quoted.

There is no judicial authority as to the meaning of the word, save in a case of *Drhew v. Altoona City*, 121 Penn. St. 401, in which the Supreme Court of Pennsylvania in appeal decided that "rock" excavation included "all the divers qualities of what was properly called rock, encountered in the progress of the work" (p. 421). The agreement there provided that the contractor was to be paid 35 cents per cubic yard for earth excavation, and 75 cents for rock excavation.

App. Div.
1918

MILLS
v.

CONTIN-
ENTAL
BAG AND
PAPER CO.

Hodgins, J.A.

App. Div.
1918

MILLS
v.

CONTIN-
ENTAL
BAG AND
PAPER Co.

Hodgins, J.A.

I think the same rule must be applied in this case, and that rock, either in stratified or boulder form, was not included in the written contract, but may be recovered for under the circumstances disclosed here. Enough evidence was given to enable the Court to conclude that the boulders charged for were of sufficient size to distinguish them from stones or small boulders such as were buried, and there seems no reason for sending the case back upon that point.

The case quoted also refers to the limitation upon the functions of an architect, i.e., that he cannot make a new contract for the parties, and that they are not bound by his classification or certificate unless they have expressly agreed to accept it as final.

I think the architect's measurements are the most accurate and can be used as a basis for payment.

He gives the cubic yards at 4,386. This is all the appellant is entitled to at \$1 per yard. No proof other than the testimony of the appellant was given as to the cost of the excavation of these boulders, namely, \$659, and it stands uncontradicted. The price he mentioned to the architect, namely, three times that of earth, would make it \$750.

Taking the lower figure, \$659, and adding it to \$4,386, the total is \$5,045, of which the appellant has received \$4,650, leaving a balance due him of \$395: judgment should be entered for the appellant for this amount, with costs throughout.

Appeal allowed.

1918.

Nov. 14.

[RIDDELL, J.]

REX V. DI FRANCESCO.

Criminal Law—New Trial—Powers of Trial Judge—Criminal Code, sec. 1021—Leave to Move Court of Appeal for New Trial on Ground that Verdict against Weight of Evidence—Conviction for Manslaughter—Evidence—Affidavit of Witness Contradicting Testimony Given at Trial—Admissibility—Verdict not against Weight of Evidence—Refusal of Leave—Question of Law Reserved for Court of Appeal.

The Judge presiding at a criminal trial has no power to grant a new trial. History of the law and practice as to granting new trials in criminal cases, with references to statutes and decided cases.

Leave to move the Court of Appeal—now the Appellate Division of the Supreme Court of Ontario—for a new trial may, by virtue of sec. 1021 of the Criminal Code, R.S.C. 1906, ch. 146, be given by the trial Judge, but only on the ground that the verdict is against the weight of evidence.

The prisoner was indicted for murder and convicted of manslaughter. The plea was that he acted in self-defence on being threatened by the deceased with a knife. At a preliminary investigation, a witness swore that she saw the beginning of the fracas between the prisoner and the deceased, and that the deceased had a knife in his hand. At the trial she swore that she saw no knife—and no knife was in fact found on the deceased. Upon an application by the prisoner for a new trial or for leave to move for a new trial, an affidavit made by this witness after the trial was read; in it she stated that she did not see a knife in the deceased's hand, and had sworn as she did at the trial because of threats:—

Held, even if this affidavit were to be credited, that the verdict was not against the weight of evidence; and the application should be refused.

Seem, the affidavit could not be received.

At the request of counsel for the prisoner, the question whether the trial Judge was bound as a matter of law to give leave to move for a new trial on the ground that the verdict was against the weight of evidence, was reserved for the Court of Appeal.

INDICTMENT of the prisoner for murder. Verdict of guilty of manslaughter.

An application on behalf of the prisoner was made to RIDDELL, J., who presided at the trial, for a new trial or for leave to move the Court of Appeal for a new trial.

The motion was heard at the Assizes in Toronto.

T. C. Robinette, K.C., for the prisoner.

T. J. Agar, for the Crown.

November 14. RIDDELL, J.:—On an indictment for murder, the prisoner was found guilty of manslaughter by a jury of the County of York, on the 4th November, 1918.

At the trial a young girl, Gertrude Dyson, was called for the

Riddell, J.

1918

REX

v.

DI

FRANCESCO.

Crown: she had seen the beginning of the fracas between the prisoner and the deceased.

The defence was that the prisoner acted in self-defence on being threatened by the deceased with a knife—the witness swore she did not see any knife in the hand of the deceased (no knife was in fact found on the deceased when examined a few hours after his death). She had, on a preliminary investigation, sworn that she had seen a knife in the deceased man's hand; but she said at the trial that this was not true.

After the verdict of manslaughter had been rendered and the prisoner remanded for sentence, Mr. Robinette produced to me an affidavit in which the girl Dyson swore that she did see a knife in the hand of the deceased, but that she had given the evidence she had at the trial because of threats. Counsel thereupon asked me to grant a new trial—or to grant leave to move the Court of Appeal for a new trial.

I think I have no power to do either, even if I were inclined to do so, which I am not.

The power of granting a new trial is either common law or statutory.

The Province of Upper Canada began its separate provincial life with the English Criminal Law in force in its whole territory, by the combined effect of the Royal Proclamation of 1763 and the Quebec Act of 1774, 14 Geo. III. ch. 83 (Imp.); and, except as modified by legislation, the criminal side of the Common Law of England is still in force.

As is well known, the Judge in England who presided at criminal trials at “the Assizes” was a Commissioner, sitting under the authority of the two Commissions of Oyer and Terminer and of General Gaol Delivery, the former enabling him to try all indictments found before him, the latter all indictments, wherever found, against any person in the gaol of the county. Of course he also had his Commission of the Peace. These Commissioners never had any power to grant a new trial: they were *functi officii* when they had tried the case and made the orders, given the sentences etc. which necessarily followed the verdict. All applications for a new trial must be made in the Court of King's Bench.

Nor was there any power in any Court—not even the Court

of King's Bench—to grant a new trial in a case of felony (of course manslaughter is a felony at the common law).

In one case, *Regina v. Scaife* (1851), 17 Q.B. 238, the Court of Queen's Bench did make an order for a new trial at the instance of a prisoner who had been convicted of robbery at the York Assizes before Cresswell, J. No precedent for such an order was cited or can be found, and it is plain that the order was *per incuriam*. The case was disapproved by the Judicial Committee in *Attorney-General for New South Wales v. Bertrand* (1867), L.R. 1 P.C. 520, S.C., 16 L.T.N.S. 752, where the law is carefully considered. See also the case of *Rex v. Inhabitants of Oxford* (1811), 13 East 411, 415 (n.), in which all the authorities up to that time are collected.

In Upper Canada the English practice was followed: there was no new trial in felonies. In 1851, an Act was passed, 14 & 15 Vict. ch. 13 (Can.), which enabled the trial Judge, in case of a conviction, to reserve a case for the consideration of either Common Law Court, but it was held that this did not empower the Court to grant a new trial: *Regina v. Baby* (1854), 12 U.C.R. 346.

In 1857, by 20 Vict. ch. 61, secs. 1, 2, 4 (Can.)—*cf.* C.S.U.C. ch. 113, secs. 1, 3, 6, 7—Parliament enacted that a person convicted of a crime might apply for a new trial upon any point of law or question of fact, in as ample a manner as any person may apply to the Superior Courts of Common Law for a new trial in a civil action, and if the conviction be affirmed the person convicted may appeal to the Court of Error and Appeal. If the conviction was in the Quarter Sessions, the application for a new trial must be made to that Court, and if the appeal should fail, a further appeal lay to a Court of Common Law.

In 1869, by 32 & 33 Vict. ch. 29, sec. 80 (Dom.), all power was taken away from every Court to grant a new trial. Thereafter the convicted person must rely upon a case reserved for one of the Common Law Courts; the appeal from the Common Law Courts to the Court of Error and Appeal was also taken away.

When the Criminal Code was enacted in 1892, 55 & 56 Vict. ch. 29 (Dom.), power was given, on the refusal of the trial Judge to reserve a case, for the convict (with the leave of the Attorney-General given in writing) to move the Court of Appeal for such a case: when a reserved case should come before the Court of

Riddell, J.

1918

REX

v.
DI

FRANCESCO.

Riddell, J.

1918

REX

v.

DI

FRANCESCO.

Appeal, that Court might order a new trial or make such order as it should deem proper. If the Judges of the Court of Appeal were unanimous, their decision was to be final; if not, an appeal might be taken to the Supreme Court of Canada.*

Some changes have been made in the practice: at the present time the "Court of Appeal" is, in Ontario, the Appellate Division of the Supreme Court; and there is no need for a convicted person to obtain the leave of the Attorney-General.

Nowhere is there any power given by statute to the trial Judge to grant a new trial, and I must refuse to order a new trial.

As respects my giving leave to move the Court of Appeal for a new trial, there is no such practice known to the Common Law: and the sole statutory authority is to be found in sec. 1021 of the Code, R.S.C. 1906, ch. 146, which permits such leave only on the ground of verdict against the weight of evidence. Not only is the verdict not against the weight of evidence, but the whole evidence, with the exception of that of the prisoner (which I did not believe and which to my mind is inconsistent with the results of the *post mortem* examination), is in favour of a verdict of guilty; the only objection which might be taken to it on that ground is that the verdict might rather be "guilty of murder."

As to the affidavit now filed, it is clear law that on an application for a new trial in civil cases, an affidavit from a witness contradicting his evidence at the trial cannot be received: *Harrison v. Harrison* (1821), 9 Price 89; *Phillips v. Hatfield* (1840), 10 L.J.N.S. Ex. 33, 8 Dowl. P.C. 882; *Berry v. Da Costa* (1866), L.R. 1 C.P. 331; *Cardwell v. Cardwell* (a decision of the Queen's Bench Division, Ontario, in 1894, unreported); *Rushton v. Grand Trunk R.W. Co.* (1903), 6 O.L.R. 425.

Even if I were to believe this affidavit, I do not think the verdict against the weight of evidence. I refuse leave to appeal under sec. 1021 of the Code.

But, at the request of the prisoner's counsel, I reserve for the opinion of the Court of Appeal the question of law: "Whether I am bound as a matter of law to give leave to move for a new trial on the ground that the verdict was against the weight of evidence."

I sentenced the prisoner to 15 years' imprisonment; but, under sec. 1023 of the Code, I suspend the sentence that the

*See secs. 742 *et seq.*

opinion of the Court of Appeal may be had—the prisoner to remain in custody.

I have of course handed the affidavit to the Crown officer that he may make proper inquiries and take the proper proceedings thereon.

A somewhat full discussion of the practice in granting new trials at the Common Law and under statute will be found in two articles in the Yale Law Journal, vol. 26, pp. 49 *sqq.* (November, 1916), and vol. 27, pp. 353 *sqq.* (January, 1918).

Riddell, J.

1918

REX

v.

DI

FRANCESCO.

[ROSE, J.]

1918

Nov. 18.

BANK OF MONTREAL v. STAIR.

Fraudulent Conveyance—Action by Execution Creditors of Husband to Set aside Conveyances of Land by Husband to Wife—Evidence—Finding of Fact—Belief of both Parties that Wife True Owner—Absence of Desire on Part of Husband to Defeat, Hinder, or Delay Creditors—Desire on Part of Wife to Prevent Property Falling into Hands of Husband's Creditors—Circumstances Negating Intent to Defraud—Consideration for Conveyances—Dismissal of Action—Costs.

In an action by execution creditors of a man to set aside, as fraudulent, conveyances of lands made by him to his wife, it was found as a fact by the trial Judge that both the grantor and his wife believed the wife to be the true owner and to be entitled to conveyances, and that the grantor was not actuated by any desire to defeat, hinder, or delay the plaintiffs or any other creditor.

The question in such cases is always whether there was an actual intent to defeat, hinder, or delay creditors; and the circumstance that the conveyance is made because of a belief that there is a legal obligation to convey is sufficient to negative any intent to defraud.

Ottawa Wine Vaults Co. v. McGuire (1912), 27 O.L.R. 319, 324, and *Carr v. Corfield* (1890), 20 O.R. 218, followed.

It made no difference in the result whether there was or was not consideration for the conveyances; but, *semble*, there was consideration.

There was a desire on the part of the wife to prevent the property falling into the hands of her husband's creditors, but that was not sufficient to avoid the conveyances: see *Gibbons v. Tomlinson* (1891), 21 O.R. 489, at p. 497. The action was dismissed, but without costs, as the circumstances were such as to arouse suspicion and to justify an inquiry.

ACTION to set aside conveyances of lands from the defendant F. W. Stair to his wife, the other defendant, as fraudulent and void as against the plaintiffs, execution creditors of F. W. Stair.

October 18. The action was tried by ROSE, J., without a jury, at a Toronto sittings.

1918

BANK OF
MONTREAL
v.
STAIR.

Wallace Nesbitt, K.C., and *J. A. Worrell*, K.C., for the plaintiffs.

H. J. Scott, K.C., and *T. R. Ferguson*, for the defendant *Della M. Stair*.

G. W. Mason, for the defendant *F. W. Stair*.

November 18. ROSE, J.:—In the year 1901, the defendant *F. W. Stair*, who had had experience as the manager of theatres in various cities, heard that there was for sale in Toronto a building which might be made suitable for a theatre in which to give performances of burlesque. He and his wife, who had also had theatrical experience, came to Toronto to make investigations, and it was decided to buy the building. Apparently, *F. W. Stair* was without means, but his wife had some money, and paid the amount which had to be paid in cash, \$5,250. The conveyance was taken in the name of *F. W. Stair*, and he executed a mortgage for \$10,250, the balance of the purchase-price, *Mrs. Stair* joining in it to bar her dower. About a month later, *F. W. Stair* conveyed the land, subject to the mortgage, to *Mrs. Stair*, the deed reciting that she had advanced the moneys required to effect the purchase, upon the understanding and agreement that *F. W. Stair* should forthwith convey the land to her. No very satisfactory explanation as to why the conveyance from the vendors was taken in the name of *F. W. Stair* is forthcoming.

The theatre was soon opened. *F. W. Stair* was known as manager, but *Mrs. Stair* took an active part in the business. At first she sold the tickets and did other work; but, after a time, the work in the box-office was handed over to a paid employee, and *Mrs. Stair* ceased to perform services in the theatre itself, although it is probably true that she continued to discuss with her husband the affairs of the business and to advise him as to the course to be followed. The bank-account was in the name of *F. W. Stair*, but *Mrs. Stair* had a power of attorney from him to sign cheques; and, apparently, each of them drew moneys from the bank at will.

The business was very prosperous. Out of the profits the mortgage was paid off, and the properties in question in this action and other properties, *inter alia*, a dwelling-house, were bought. One of the properties in question is a leasehold interest in a piece

of land near the theatre, upon which there was a warehouse. This was acquired in 1905, as an investment. The other is land adjoining the theatre, acquired in 1906, as a site for an extension to the theatre, which extension was built in due course. The conveyances of both of these properties were taken in the name of F. W. Stair, for some reason which does not appear, or for no reason at all, as Mrs. Stair says, except that F. W. Stair was her husband. Mrs. Stair asserts that she often asked her husband for conveyances to herself, and that when she spoke to him he always said that he was going away, but would attend to the matter upon his return.

Some differences arose between the two defendants, and they ceased to live together. After the separation, Mrs. Stair consulted Mr. Charles Millar about her rights. She knew that her husband was interesting himself in a new theatrical venture known as the Progressive Circuit, and she feared, as she admits, that he might lose money in that new venture, and that if the lands continued to stand in his name they might fall into the hands of his creditors; but she says that she did not know that he had, in connection with the new business, bought land in Montreal. (The plaintiffs' judgment is upon a mortgage of this Montreal land.)

Mr. Millar sent for F. W. Stair, questioned him, had searches made in the registry office, and demanded conveyances. The deeds in question are the result. Concurrently with them there was executed an agreement by which Mrs. Stair engaged F. W. Stair as manager for five years, at a salary of \$5,000 a year, and released him from all liability to account for his past dealings.

It does not seem to me to be necessary to decide whether, as a matter of law, lands acquired and held as these lands were would, in the absence of special agreement, belong to the wife or to the husband or to the two as partners; because I think it is clear upon the evidence that, whatever the law is, both defendants believed Mrs. Stair to be the owner and to be entitled to a conveyance.

If there was no agreement that the husband should be the owner, there would be nothing unnatural in a belief that lands paid for out of the profits of a business conducted in premises

Rose, J.
1918
BANK OF
MONTREAL
v.
STAIR.

Rose, J.

1918

BANK OF
MONTREAL

v.

STAIR.

bought with the wife's money were the wife's lands; and such a belief would be very natural indeed if, as in this case, one of the pieces of land was acquired and used as a site for an extension to the building originally purchased and promptly conveyed to the wife. I recognise the fact that in a case like this it would probably be unsafe to hold upon the evidence of the parties alone that, natural as such a belief might be, it actually existed: see *Koop v. Smith* (1915), 51 Can. S.C.R. 554, 25 D.L.R. 355; but I unhesitatingly accept the evidence of Mr. Millar, and his statement of the circumstances under which the conveyances were made convinces me that F. W. Stair was telling the truth when he said in the witness-box that, when he had thought about the demand made upon him, he came to the conclusion that he "had not a leg to stand upon," and that he had better make the best bargain possible. I do not believe that he was actuated by any desire to defeat, hinder, or delay the plaintiffs or any other creditor.

It was argued that the conveyances were voluntary, notwithstanding the release of F. W. Stair from liability to account and the engagement of him as manager. It may be that the release did not amount to much; it might well be found that F. W. Stair's drawings from the bank were with the consent of Mrs. Stair, and that there was really a gift to him of the moneys drawn or of her interest in such moneys, and, therefore, that he was under no liability to account; but, however that may be, there does not seem to be any reason for holding that the agreement to employ him was fictitious, and I do not see why it should not be looked upon as consideration for the conveyances. It is true that he did not serve as manager for any time after the agreement was made; but it seems to be true also that Mrs. Stair had perfectly good grounds for dismissing him. For these reasons, I am not prepared to deal with the case upon the footing that there was no consideration for the conveyances: but, upon my finding as to the reason why the conveyances were made, it appears to me that it makes no difference in the result whether there was or was not consideration. It is true that there are in the cases many very broad statements to the effect that if, after deducting the property which is the subject of a voluntary conveyance, the grantor's remaining assets are insufficient for the payment of his debts, it must be presumed that his intent was to defraud his creditors.

Such a case is *Freeman v. Pope* (1870), L.R. 5 Ch. 538; but, as was said by Meredith, J.A., in *Ottawa Wine Vaults Co. v. McGuire* (1912), 27 O.L.R. 319, 324, "rules, based on certain circumstances, as to when a transaction should be, and when it should not be, considered fraudulent, must always give way if they conflict with the very truth regarding the question of intent. In short, the single question in such cases as this always has been, and must always be, whether the transaction impeached was actually made with intent to defeat, hinder, or delay creditors. The means of proving the intent is another thing."

A case in which the general rule as to inferring the fraudulent intent where the conveyance is voluntary gave way, because it conflicted with the very truth, as disclosed by all the evidence, is *Carr v. Corfield* (1890), 20 O.R. 218. The conveyance there attacked was the spontaneous act of the grantor. She thought that she was a trustee of the land, and the conveyance was to the supposed *cestuis que trust*. In fact, there was no valid trust, but the circumstance that the belief existed was held to negative any intent upon her part to defraud her creditors. That case seems to me not to be distinguishable from the present one, and it is quite in accord with other cases. For instance, in *In re Vingoe & Davies, Ex p. Viney & Norton* (1894), 1 Mans. B.C. 416, Vaughan Williams, J., said (p. 419): "If a debtor makes a payment under the belief that he is under a legal obligation to make it, that will prevent the payment being a fraudulent preference; but doing so under a sense of honour or moral obligation alone will not, any more than a mere motive of kindness." That was a case of an attack upon a conveyance as a preference, void under the Bankruptcy Act, but the words quoted seem to be quite applicable here. See also *In re Fletcher, Ex p. Suffolk* (1891), 9 Morr. B.C. 8; *In re Vautin, Ex p. Saffery*, [1900] 2 Q.B. 325; and as to the effect of the existence of a desire upon the part of Mrs. Stair to prevent the property falling into the hands of her husband's creditors, see *Gibbons v. Tomlinson* (1891), 21 O.R. 489, at p. 497.

The action fails; but the circumstances were such as to arouse suspicion and to justify an inquiry, and I think the dismissal ought to be without costs.

Rose, J.

1918

BANK OF
MONTREAL
v.
STAIR.

1918

June 17.

Nov. 19.

[APPELLATE DIVISION.]

RE BUTTERWORTH AND CITY OF OTTAWA.

Municipal Corporations—By-law of Urban Municipality Requiring Weighing of Coal and Coke on Public Weighing Machines—Power of Council to Pass—Municipal Act, sec. 401, para. 13 (8 Geo. V. ch. 32, sec. 8(1))—"With the Approval of the Municipal Board"—Conditions which may be Prescribed by Order of Board—Approval Given after Passing of By-law—No Conditions Imposed—Motion to Quash By-law—Discretion—Costs.

The disposition of the Courts is to interfere as little as possible with the exercise of the legislative functions of municipal councils, when that exercise falls within the proper limits of their powers.

The jurisdiction to quash a municipal by-law is discretionary; and, when the subject legislated upon is clearly within municipal authority, and the objection is merely to the mode in which the particular power has been exercised, and that defect can be remedied by further or different action, the by-law should not be quashed unless it is clear that the method adopted cannot be supported in any view of the matter.

The Municipal Act, sec. 401, para. 13 (as enacted by the Municipal Amendment Act, 1918, 8 Geo. V. ch. 32, sec. 8), provides that by-laws may be passed by the councils of urban municipalities, "with the approval of the Municipal Board, and within the limitations and restrictions and under the conditions prescribed by order of the Board, for requiring all persons who shall, after a sale thereof, deliver coal or coke within the municipality," to have the weight ascertained by means of a weighing machine provided by the municipality. After the passing of the amending Act, the Council of the City of O. passed a by-law providing for the compulsory weighing on public weigh-scales of all coal and coke sold and delivered within the city. The by-law was not, before its final passing, approved by the Ontario Railway and Municipal Board, but was so approved after it had been passed and after a motion to quash it had been made:—

Held, that, the approval having been given, no limitations, restrictions, or conditions having been imposed, and the matter being in the discretion of the Court, the by-law should not be quashed; though, *semble*, the wording of the new para. 13 lent itself to the view that the Board's action regarding conditions should precede the passing of a by-law.

The principle enunciated in other cases where approval is needed to validate an act, adopted: *Re Boulton and Town of Peterborough* (1859), 16 U.C.R. 380, 386, 387; *In re Huson and Township of South Norwich* (1892), 19 A.R. 343, 350, 351; *Cartwright v. Town of Napanee* (1905), 11 O.L.R. 69, 72; *Mackenzie v. Maple Mountain Mining Co.* (1910), 20 O.L.R. 615, 618; *Re v McDevitt* (1917), 39 O.L.R. 138, 140.

Orders of FALCONBRIDGE, C.J.K.B., and the Ontario Railway and Municipal Board, affirmed, but without costs, as when the motion to quash the by-law was launched the by-law had not been approved.

MOTION by J. G. Butterworth for an order quashing by-law No. 4522 of the City of Ottawa.

May 11. The motion was heard by FALCONBRIDGE, C.J.K.B., in the Weekly Court, Ottawa.

Taylor McVeity, for the applicant.

F. B. Proctor, for the city corporation.

June 17. FALCONBRIDGE, C.J.K.B.:—The objection to the by-law was that it was not passed with the approval of the Ontario Railway and Municipal Board as required by sec. 401, para. 13, of the Municipal Act, as enacted by sec. 8 (1) of the Municipal Amendment Act, 1918, 8 Geo. V. ch. 32.

Since the argument of this motion, the by-law has received the approval of the Board, but the applicant contends that such approval should have preceded the passing of the by-law. *In re John Inglis Co. Limited and City of Toronto* (1904), 8 O.L.R. 570, is cited in support of this contention. But the language of the Consolidated Municipal Act applicable to that case left no room for doubt or misapprehension. It provided, "Without the consent of the Government of Canada no municipal council shall pass a by-law . . . ," pointing clearly to a consent obtained in advance.

I cite with approval the opinion of the Board on this point.

The motion is dismissed with costs.

The opinion of the Board, written by the Chairman, was as follows:—

This is an application by the Municipal Corporation of the City of Ottawa for the approval by the Board of by-law No. 4522, intituled "A By-law amending By-law No. 3358, intituled 'A By-law to regulate Markets and Weighhouses'." The approval of the Board is rendered necessary by reason of sec. 401, para. 13, of the Municipal Act, as enacted by sec. 8 of the Municipal Amendment Act, 1918. Section 401 enacts that "by-laws may be passed by the councils of urban municipalities for certain purposes; and para. 13 reads as follows:—

"13. With the approval of the Municipal Board, and within the limitations and restrictions, and under the conditions prescribed by order of the Board, for requiring all persons who shall, after a sale thereof, deliver coal or coke within the municipality, by a vehicle, from any coal-yard, store-house, coal-chute, gas-house or other place:

"(a) To have the weight of such vehicle and of such coal or coke ascertained prior to delivery, by a weighing machine established as provided by paragraph 11.

"(b) To furnish the weighmaster in charge of such weighing

Falconbridge,
C.J.K.B.

1918

RE
BUTTER-
WORTH
AND
CITY OF
OTTAWA.

1918

RE
BUTTER-
WORTH
AND
CITY OF
OTTAWA.

machine, and to surrender to each purchaser, at the time of delivery, a weigh-ticket, upon which has been printed or written the name and address of the vendor, and the name of the purchaser, and to have such weigh-ticket dated and signed by such weighmaster, and to have him enter thereon the weight of such coal or coke."

By-law No. 3358, passed in 1912, which is amended by by-law No. 4522, is in great part a revision and consolidation of various by-laws relating to markets. This by-law contains sec. 48, which was enacted originally in the year 1890 as a part of by-law No. 1081, and is in the following words:—

"48. No person shall, upon or after the sale thereof, deliver any coal from a waggon or other vehicle, or cause the same to be delivered, without first having the same weighed upon one of the city weigh-scales in accordance with the provisions of this by-law. (B. 1081/90, s. 1, in part.)"

This section (48) was repealed by by-law No. 4522, and the following was substituted for it:—

"48. Every person who shall after a sale thereof deliver coal or coke within the City of Ottawa by means of a vehicle from any coal-yard, coal-chute, store-house, gas-house or other place, shall have the weight of the coal or coke conveyed in or upon such vehicle, ascertained prior to making delivery thereof, upon a weighing machine established and operated by the corporation as hereinbefore provided."

The two sections—the one in form affirmative, the other negative—aim to ensure the same purpose, the compulsory weighing on public weigh-scales of all coal sold and delivered from vehicles within the city.

The original of sec. 48, passed in 1890, was interpreted by the city authorities and by coal-dealers as imposing a duty upon the dealers delivering coal by waggon or other vehicle within the city to weigh it on one of the city weigh-scales. This interpretation was during all these years acted upon until questioned by Mr. Butterworth, a coal-dealer of long standing in Ottawa. This gentleman, who, it appears, carried on business at two coal-yards, had complied with sec. 48 of by-law No. 3358, as generally interpreted, for many years. In or about the year 1916, Mr. Butterworth opened a third coal-yard, and erected weigh-scales on his

own premises, and applied to the city council asking that his scales be taken over by the city as public weigh-scales and operated at the expense of the city, but for the weighing of his coal only. It appears that the Corporation of the City of Ottawa leases six weigh-scales, and owns four, besides two market-scales, which are distributed throughout the city at convenient points and are all operated as public weigh-scales, each in charge of an official weighmaster appointed by the city council. To Mr. Butterworth's proposal the city corporation replied expressing its willingness to take over his weigh-scales and operate them as public scales, provided Mr. Butterworth would pay any deficit on the operation, and permit the weighing of all commodities upon them. This offer Mr. Butterworth declined, and proceeded, in defiance of the provisions of sec. 48 of city by-law No. 3358, as theretofore interpreted by the city authorities, to sell and deliver coal in the city without having it first weighed upon the public weigh-scales. The result was a prosecution of Mr. Butterworth by the city corporation for breach of the city by-law, and his conviction: this conviction was quashed, on the grounds set out in the case *Rex v. Butterworth* (1917), 13 O.W.N. 263. Subsequently para. 13 of sec. 401 of the Municipal Act, above cited, was enacted by the Legislature, and the amending by-law No. 4522 was afterwards passed by the Council of the City of Ottawa.

In view of the liberal provision made by the city corporation for the public weighing of coal at various points within the city, and the length of time this practice, regarded by the coal-dealers as obligatory upon them, had prevailed, without complaint, and, so far as appears, to the public advantage, the Board has reached the conclusion that it would be unwise, in the exercise of its discretion, to impose limitations, restrictions, or conditions upon the enacting faculty of the city council, and that it should approve by-law No. 4522 without more.

It was urged by Mr. McVeity that by-law No. 3358 was a defunct by-law, and that on its passage the powers of the council were spent, citing *In re John Inglis Limited and City of Toronto*, 8 O.L.R. 570. As to this it seems to the Board, first, that neither by-law No. 3358 nor sec. 48 has been held to be invalid either in the case *Rex v. Butterworth* or in any other proceedings; and, secondly, the *Inglis* case does not seem applicable, as the by-law

1918

RE
BUTTER-
WORTH
AND
CITY OF
OTTAWA.

1918
RE
BUTTER-
WORTH
AND
CITY OF
OTTAWA.

in question in that case was unquestionably void, wanting the antecedent sanction of the Government of Canada, whereas many of the provisions of by-law No. 3358 are of undoubted validity, and by-law No. 4522 is clearly within the competence of the council when approved by the Board.

It was suggested as a reason for withholding the Board's approval to the by-law that the policy of the council might result in a monopoly in the coal-business, to the detriment of the public. Of this no evidence was submitted, notwithstanding that the policy of requiring compulsory weighing on public weigh-scales had obtained for many years. Even should such a danger arise, it seems to the Board that public opinion would speedily exert pressure on the council to modify its by-law, either by establishing additional weigh-scales or dispensing with the obligation to weigh at public scales.

The by-law will be approved.

The order of the Board approving the by-law was dated the 8th June, 1918.

J. G. Butterworth appealed from the order of FALCONBRIDGE, C.J.K.B., and from the order of the Board.

November 1. The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

McVeity, for the appellant, argued that the by-law should be quashed for non-compliance with the provisions of sec. 401, para. 13, of the Municipal Act, which requires that such a by-law must be passed "with the approval of the Municipal Board." Such approval had not been obtained when the by-law was passed, and the approval which was subsequently obtained could not validate it: *In re John Inglis Co. Limited and City of Toronto*, 8 O.L.R. 570. The *Inglis* case shews that the approval of the Board must be obtained before the final passing of the by-law, and such a condition is clearly in the interest of the public, as it allows full discussion, and, if necessary, amendment, of the provisions of the by-law before it has received the sanction of the council.

Proctor, for the respondent, the city corporation, argued that the *Inglis* case was distinguishable, as the language of the sec-

tion of the Municipal Act which was there in question made it perfectly clear that the consent of the Government was a necessary preliminary to the passing of the by-law. In this case it was impossible that the passing of the by-law and the consent of the Board should be literally concurrent. The matter legislated upon was clearly within the authority of the council, and the objection was simply a technical one, to which effect should not be given. He referred to Farwell on Powers, 3rd ed., p. 159, and *Firth v. Staines*, [1897] 2 Q.B. 70.

McVeity, in reply, referred to *Saxton v. Beach* (1872), 50 Mo. 488.

November 19. The judgment of the Court was read by HODGINS, J.A.:—Appeals from the judgment of the Chief Justice of the King's Bench refusing to quash by-law No. 4522 of the City of Ottawa, and from the order of the Ontario Railway and Municipal Board approving of the by-law.

The point at issue in both these appeals is the right of the municipal corporation to pass such a by-law regulating markets and weighhouses without the previous approval of the Board.

The legislation which requires such approval is found in sec. 401, para. 13, of the Municipal Act, as enacted by sec. 8 of the Municipal Amendment Act of 1918. It is as follows (setting it out, as above).

The section of by-law 4522 which is attacked is in these words (setting it out, as above).

The disposition of the Courts is to interfere as little as possible with the exercise of the legislative functions of municipal councils, when that exercise falls within the proper limits of their powers.

And, as the jurisdiction to quash a by-law is discretionary, a further principle may be safely asserted: that is, that when the subject legislated upon is clearly within municipal authority, and the objection is merely to the mode in which the particular power has been exercised, and that defect can be remedied by further or different action, the by-law should not be quashed unless it is clear that the method adopted cannot be supported in any view of the matter.

In the case in hand the sole question is whether the Board must act first and if desirable lay down certain limitations, restrictions,

App. Div.
1918

RE
BUTTER-
WORTH
AND
CITY OF
OTTAWA.

App. Div.
1918

RE
BUTTER-
WORTH
AND
CITY OF
OTTAWA.

Hodgins, J.A.

and conditions to which any by-law thereafter passed must conform before approval, or whether, when a by-law has passed its third reading and is, but for the want of approval, a complete act of legislation, the Board can then approve of it, if its provisions seem to the Board to be proper and reasonable.

Read literally, the enactment that "by-laws may be passed by the councils of urban municipalities . . . with the approval of the Municipal Board," would seem to require concurrent consent to the act of passage. But, this being a practical impossibility, the action of the Board must be either prior or subsequent. In actual practice the action of the Board would be taken either after the by-law was passed, as here, or between its second and third readings, as in the case of by-laws requiring the assent of the electors, or before the by-law took form and shape. In the latter case some way would have to be found of getting the Board to lay down some general conditions for such by-laws and for approving of those which complied with these provisions. That course is open to the objection that conditions may and probably would differ in different cities and towns and that it might be hard to forecast proper regulations which would fit each locality. Besides this, there is the difficulty of getting the Board to act unless there is some concrete case necessitating the exercise of its functions. If application were made by any municipality, it is quite likely that the Board would ask that the proposed legislation of which its approval was should be put in shape and submitted.

These considerations, while rendering it probable that a reasonable course has been pursued in the present instance, cannot control the construction of the statute, if the words clearly point to an opposite conclusion.

But they add force to the contention that where the approval has been given and no conditions etc. have been laid down, the statute has been complied with in fact and in law as well.

I confess that the wording of the amended section lends itself, in my judgment, to the view that the Board's action regarding conditions should precede the passage of a by-law. But its prior approval of a by-law cannot be had except by a resolution in general terms, and the whole section is therefore open to the other construction, which does no great violence to the language and certainly results in no legal miscarriage. The by-law is inopera-

tive till approval is gained, and that approval is, I think, intended to be a consent to the particular by-law. Any other method of approval would, in case of a prosecution, necessitate not only proof of the breach of the by-law but also a consideration of how clearly the conditional approval, given in a general way and prior to the municipal enactment, covered the actual by-law in question—a rather clumsy procedure.

If the provisions of the section are to be construed as conditions precedent, the result would be similar to that pointed out in *Rex v. Lincolnshire Appeal Tribunal*, [1917] 1 K.B. 1, 14, by Swinfen Eady, L.J., that, as the appellant there had no control over the **acts** of others, and as acts had to be done by the local tribunal, his appeal might be rendered abortive if the local tribunal failed in any way to comply with the requirements of the regulations: so here, if the Board declined to initiate matters, no urban municipality could ever pass such a by-law.

As it is a matter of discretion, I think, for these reasons, the by-law should not be quashed.

The rule I suggest as one which it is safe, and indeed advisable, to proceed on, is based upon the same principle as has been adopted in other cases where approval is needed to validate some act.

In *Mackenzie v. Maple Mountain Mining Co.* (1910), 20 O.L.R. 615, the Court dealt with a statute which provided that “no by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting.” There was a by-law for payment to the president of an amount to be afterwards fixed; that by-law was ratified by the shareholders; the shareholders themselves fixed the amount, and the directors then, in terms of the by-law and as to amount in accordance with the expressed wish of the shareholders, fixed the amount of the remuneration or payment to be made. The Court of Appeal held that the statute was sufficiently complied with. Osler, J.A., says (p. 618):—

“I agree with Britton, J., that in substance all that the Act requires has been done. The mind of the directors has been expressed; so also has that of the shareholders, and exactly to the same purpose and with the same result.”

In *In re Huson and Township of South Norwich* (1892), 19 A.R.

App. Div.
1918

RE
BUTTER-
WORTH
AND
CITY OF
OTTAWA.

Hodgins, J.A.

App. Div.
1918

RE
BUTTER-
WORTH
AND
CITY OF
OTTAWA.

Hodgins, J. A.

343, Hagarty, C.J.O., delivering the judgment of the Court, said (pp. 350, 351):—

“But the Courts from the earliest date have striven to avoid undue strictness in the insistence of exact performance of statutable formalities, where they could see that the objection did not reach either to the clear omission of some condition precedent required to be performed:—where a mistake had been made in perfect good faith and with an honest purpose of obeying the law, although unintentionally deviating from its strict formal observance—where the objection was wholly technical and nothing had occurred to create a suspicion of unfair dealing, and there was no reason whatever to believe that the result of the whole proceedings had been affected.”

In *Re Boulton and Town of Peterborough* (1859), 16 U.C.R. 380, where the statute provided that the manner of ascertaining the consent of the electors should be determined by the by-law, the Court dealt with that provision from much the same point of view. Sir John Robinson, C.J., there said (pp. 386, 387):—

“The 18th clause of the statute 14 & 15 Vict. ch. 51 does literally provide that the manner of ascertaining the consent of the electors shall be determined *by the by-law*. But that must receive a reasonable construction. The proposed by-law could not be an actual by-law till after the consent of the ratepayers had been obtained, and it was therefore incorrect to require that the manner of ascertaining such consent must *be determined by the by-law*. When the by-law came afterwards to be passed, all that operation would be over.

“We see no more reasonable way of complying with the enactment than that adopted in this case, of printing a notice of the time and place of holding the meeting at the foot of the draft of the proposed by-law, and authenticating that by the signature of the proper officers, so that the draft of the by-law could not be seen by any one without seeing the notice.”

I think there is much force in the observations of Middleton, J., in *Rex v. McDeritt* (1917), 39 O.L.R. 138, 140, and that they have some application here:—

“The Court should not interfere and defeat the general aim and object of the legislation because of an immaterial error on the part of an officer appointed to carry the law into operation. In

each case the search is after what is the real intention of the Legislature—was it the legislative intention that non-compliance with the particular provision of the statute should render the proceedings abortive.”

I think the Court should not be astute to quash a by-law passed by the municipal council and approved by the Board, just because the method adopted is open to some criticism due to the peculiar wording of the legislation giving authority to make the by-law effective. The only consequence would be to require the parties to try it again in a slightly different way so as to produce a result exactly the same.

In the words of Meredith, J., in *Cartwright v. Town of Napanee* (1905), 11 O.L.R. 69, 72,* there is every reason for “declining to exercise a jurisdiction which would compel the respondents to march up the hill merely to march down again at their will.”

I think both appeals should be dismissed, but without costs, as when the original motion was launched the by-law had not secured approval.

Appeals dismissed.

*See the judgment of the Court of Appeal in the same case, *sub nom. Re Cartwright and Town of Napanee* (1906), 8 O.W.R. 65.

[LATCHFORD, J.]

1918

Nov. 22.

BANK OF OTTAWA v. HAMILTON STOVE AND HEATER CO.

Company—Powers of Manufacturing Company Incorporated by Dominion Authority—Guarantee of Account of another Company with Bank—Special Clause in Charter—Business Conducted so as Directly to Benefit Company—Absence of Direct Authorisation by Directors or Shareholders—Instrument Executed under Seal of Company and Hands of General Manager and Secretary—Liability of Company.

The defendants, a company incorporated in 1910 by a charter of the Dominion of Canada, had, by the charter, power (b) to manufacture, buy, and sell hardware etc., and (i) “to guarantee the contracts of or otherwise assist” any business which the defendants were authorised to carry on, or “any business . . . capable of being conducted so as directly or indirectly to benefit” the defendants:—

Held, that the giving by the defendants of a guarantee of the account with the plaintiff bank of a company carrying on a business which the defendants were authorised to carry on, and conducted so as directly to benefit the defendants, was within the powers of the defendants under their charter.

Union Bank of Canada v. A. McKillop & Sons Limited (1913-1915), 30 O.L.R. 87, 51 Can. S.C.R. 518, distinguished.

App. Div.
1918

RE
BUTTER-
WORTH
AND
CITY OF
OTTAWA.

Hodgins, J.A.

1918
 ———
 BANK OF
 OTTAWA
 v.
 HAMILTON
 STOVE AND
 HEATER CO.

Held, also, that no formal authorisation of the guarantee by the directors or shareholders of the defendant company was necessary. The directors acted in matters incidental to the business of their company through their general manager and secretary; and the defendants were liable upon an instrument executed under the seal of the defendants and the hands of the general manager and acting secretary.

Hovey v. Whiting (1887), 14 Can. S.C.R. 515, 531, 532, followed.

AN action upon a guarantee.

October 17. The action was tried by LATCHFORD, J., without a jury, at an Ottawa sittings.

Wentworth Greene, for the plaintiffs.

H. A. Burbidge, for the defendants.

November 22. LATCHFORD, J.:—This action is upon a guarantee, dated the 22nd March, 1917, made by the defendants to secure advances etc. by the plaintiffs to the Tilden-Gurney Company Limited, a corporation organised to sell the goods manufactured by the defendants.

The defendants were incorporated in 1910 by a charter of the Dominion of Canada. Among the powers conferred were:—

“(b) To manufacture, buy, and sell hardware and kindred goods and articles.”

“(i) To enter into . . . any arrangement for . . . union of interests, co-operation, joint adventure, reciprocal concession, or otherwise, with any company carrying on or about to carry on or engage in any business or transaction which this company is authorised to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit this company; and to guarantee the contracts of or otherwise assist any such person or others having dealings with the company.”

It is to be noted that the powers set forth in this paragraph are identical with those stated in sec. 23 (1) (d) of the Ontario Companies Act, R.S.O. 1914, ch. 178, as incidental and ancillary to any powers set out in the letters patent incorporating a company under the Ontario Act.

The Tilden-Gurney Company was incorporated under the laws of the Province of Manitoba. It had the same directors and officers and “approximately the same shareholders,” and conducted from Winnipeg a business which the defendants were

authorised to engage in. That business was capable of being conducted and was in fact conducted for the benefit of the defendants. It sold throughout the western Provinces the articles manufactured by the defendants in Ontario. The guarantees were given as directly for the benefit of the defendants as for the benefit of their selling agency. By securing and maintaining credit with the plaintiffs for the subordinate company, collections made in the west were forwarded to the defendants, instead of being applied, as the manager of the Tilden-Gurney Company contended they should be, in reduction of the liability to the plaintiffs. To what extent the defendants so profited it is impossible to determine, but that they did so profit is beyond question. In one of his letters to Mr. Carrick, the defendants' president and general manager, Mr. Thompson, the manager of the Tilden-Gurney Company at Winnipeg, points out that the company's credit was impaired owing to the fact that in less than two years it had paid the defendants \$22,000 in excess of its purchases.

In 1911 the Winnipeg company was indebted to the plaintiffs. The defendants offered a guarantee of the account, but the bank required and was given a mortgage on the Winnipeg warehouse.

More security was sought in 1914, and the giving of a guarantee for \$100,000 was authorised and approved by the defendants' directors and shareholders. The form of this guarantee was not satisfactory to the bank, which submitted to the defendants' general manager a guarantee for the same amount, which was duly executed under the seal of the defendants and the hands of the general manager and secretary.

This document was duly delivered to the plaintiffs, and on the security believed to be afforded by it credit was continued and extended to the Tilden-Gurney Company.

For some reason not disclosed, the bank, on the 22nd March, 1917, prepared and had forwarded to Hamilton for execution the guarantee of that date. When delivered to the bank more than three months later, it was signed only by Mr. Carrick. The bank returned it to the manager of the Tilden-Gurney Company at Winnipeg, on the 4th July, and two days later that gentleman sent it on to Mr. Carrick. On the 9th July Carrick returned it to Winnipeg, signed by Mr. Bews, acting secretary of the Hamilton company, at the same time expressing the hope that it would be found satisfactory.

Latchford, J.

1918

BANK OF
OTTAWA
v.

HAMILTON
STOVE AND
HEATER CO.

Letchford, J.

1918

BANK OF
OTTAWA
v.
HAMILTON
STOVE AND
HEATER CO.

The satisfaction was manifestly that of the plaintiffs, though Mr. Carrick deposed at the trial that his manager at Winnipeg had no authority to deliver the document.

Before it was delivered, Mr. Carrick had an interview with the plaintiffs' manager at Winnipeg and promised that the Hamilton company "would restore the amount by which the capital of the Tilden-Gurney Company had been impaired." He rescinded his promise on the 20th July, relying on the circumstances that the directors of the Hamilton company had not expressly ratified the guarantee of 1914 in the form in which it was given, and had not at any time formally authorised or approved the guarantee of 1917.

The directors and shareholders had recognised the guarantee of 1914 at the annual general meeting of their company, held on the 22nd April, 1915. It was referred to in the report of their auditor, adopted at that meeting.

But I do not consider that any formal authorisation of the guarantees on the part of the directors or shareholders was necessary.

The giving of the guarantees was plainly within the powers of the defendants under their charter. The power is express: "to guarantee the contracts of or otherwise assist" any business which the defendants were authorised to carry on, or "any business . . . capable of being conducted so as directly or indirectly to benefit" the defendants.

No help is afforded the defendants by the decisions in *Union Bank of Canada v. A. McKillop & Sons Limited* (1913-1915), 30 O.L.R. 87 and 51 Can. S.C.R. 518, 11 D.L.R. 449 and 16 D.L.R. 701, although paragraph (i) of their charter is almost identical with the incidental powers conferred on the McKillop company by R.S.O. 1897, ch. 191, sec. 25 (e) and (f), now R.S.O. 1914, ch. 178, sec. 23 (1) (d). But the company guaranteed in that case had nothing like the same relation to the guarantors as that of the Tilden-Gurney Company to the defendants in this case. Here the Tilden-Gurney Company carried on a business which the defendants were authorised to carry on, and that business was conducted so as directly to benefit the defendants. In fact it was the defendants' business which the Tilden-Gurney Company carried on.

The rule applicable here is stated by Gwynne, J., in *Hovey v. Whiting* (1887), 14 Can. S.C.R. 515, at pp. 531, 532: "All deeds executed under the corporate seal of an incorporated company which is regularly affixed are binding on the company unless it appears by the express provisions of some statute creating or affecting the company, or by necessary or reasonable inference from the enactments of such statute, that the Legislature meant that such deed should not be executed; and the directors of the company have authority to affix the seal of the company to all such deeds not so, as above, forbidden . . . to be executed, unless they are by the express provisions of, or by necessary or reasonable inference from, the enactments of such statute forbidden to affix the seal of the company to the particular deed for the time being under consideration without compliance with some condition precedent prescribed as being essential to the validity of such deed, and which condition precedent has not been complied with."

Applying this rule to the facts established, and bearing in mind that the directors of the defendant company acted in matters incidental to the business of their company through their general manager and secretary or acting secretary, I consider that the defendant company cannot escape liability. An amendment to the writ of summons may be made by the plaintiffs, if so advised, setting up the continuing guarantee of 1914 as an additional basis of their claim.

There will be judgment against the defendants in favour of the plaintiffs for \$100,528.42, with interest from the 30th June, 1918, and costs.

Latchford, J.

1918

BANK OF
OTTAWA
v.
HAMILTON
STOVE AND
HEATER CO.

1918

Nov. 25.

[APPELLATE DIVISION.]

GALLAGHER V. WOODMAN.

Will—Action to Set aside Letters Probate—Evidence—Onus—Testamentary Capacity—Undue Influence—Finding of Trial Judge—Reversal on Appeal.

The testator, by a will made 5 days before his death, and when he was very ill, drawn from his instructions by his medical attendant, left \$1,000 to his (the testator's) only relative, a sister, who lived a long distance from him, and the remainder of his estate, the whole value of which was about \$4,000, to the defendant, a neighbour and close friend, who had been his adviser and assistant in business matters, and had, with others, taken care of him in his last illness. The defendant was present when the instructions were given and while the document was being prepared, and his son was one of the attesting witnesses. The will was admitted to probate; and the plaintiff sought in this action to set it aside and revoke the letters probate, on the grounds that the defendant occupied a position of confidence towards the testator and had procured the making of the will by undue influence, when the testator was dying and was without independent advice, and that the document admitted to probate was not the will of the deceased. The trial Judge found that the will was really not the will of the deceased:—*Held*, reversing that finding, that, the testamentary capacity of the testator not being disputed, if the onus was upon the defendant to adduce evidence to remove the suspicion raised by the circumstances in which the will was prepared and executed, the defendant had satisfied the onus, and had established that the will was that of a free and capable testator—in reality, there was no evidence that the defendant procured the will to be made, or that it was other than the voluntary act of the testator.

Review of the authorities.

MARY ANN GALLAGHER, the plaintiff, was the sister of Robert Smith, who died on the 23rd December, 1916, having executed a will 5 days before, whereby he appointed W. G. Woodman, the defendant, executor, and gave to Woodman all his estate after payment of debts, funeral and testamentary expenses, and a legacy of \$1,000 to the plaintiff. The estate consisted of a farm, valued at \$2,250, and personal estate, valued at about \$1,900. Letters probate of the will were granted on the 4th January, 1917. The testator was unmarried and lived alone on the farm; the defendant was a neighbour and friend. The testator was very ill when he executed the will, and was cared for by the defendant and the defendant's son. The will was drawn by the physician who attended the testator.

The action was brought to set aside the will and to revoke the grant of probate, upon the ground that the defendant was the confidential adviser and manager of the affairs of the deceased and had great influence and control over the mind of the deceased, who reposed the utmost confidence in the defendant, and that

at the time of the execution of the will the deceased was wholly under the influence of the defendant and acted wholly without any independent advice, and that the will of which probate had been granted was not the will of the deceased.

1918
GALLAGHER
v.
WOODMAN.

The action was tried, without a jury, by MEREDITH, C.J.C.P., who found that the will was really not the will of the deceased, and gave judgment for the plaintiff as prayed.

The defendant appealed from the judgment of MEREDITH, C.J.C.P.

October 3 and 4. The appeal was heard by MULOCK, C.J. Ex., RIDDELL, LATCHFORD, SUTHERLAND, and KELLY, JJ.

J. L. Whiting, K.C., for the appellant, argued that there had been no undue influence shewn, and that the will was the expression of the testator's own desires. The learned trial Judge had drawn wrong inferences from the evidence, based on unfounded suspicions. As to the testator's testamentary capacity there was no question. Letters probate were *prima facie* evidence of capacity; and, after probate, the onus was on the party attacking the will: *Badenach v. Inglis* (1913), 9 O.L.R. 165, 14 D.L.R. 109. The testator was of sound mind, and the will was read over to him, and he signed it. These facts shew that he knew and approved of its contents: *Atter v. Atkinson* (1869), L.R. 1 P. & D. 665; *Guardhouse v. Blackburn* (1866), L.R. 1 P. & D. 109. Under the circumstances here, the onus is not placed on the defendant; but, if it were, he has satisfied it. There was no such relationship of confidence between the testator and the defendant as to make it the latter's duty to see that the former had independent advice. There was no evidence that the defendant procured the will to be made, or that it was not the testator's voluntary act. Fraud or coercion must be shewn in order to establish undue influence: *Baudains v. Richardson*, [1906] A.C. 169; *Boyse v. Rossborough* (1857), 6 H. L. C. 2. This was not done here. Natural influence may be used to obtain a benefit under a will: *Parfitt v. Lawless* (1872), L.R. 2 P. & D. 462. The only suggestion made by the defendant to the testator about the will was one against his own interest, namely, that the testator leave his sister a larger sum than he had intended.

App. Div.
1918
—
GALLAGHER
v.
WOODMAN.

U. A. Buchner, for the plaintiff, respondent, supported the judgment below. The case was not simply one of undue influence, but the will was not the will of the testator at all. In the circumstances which existed, the defendant must satisfy the conscience of the Court that the transaction was a righteous one. This onus was upon him: *Tyrrell v. Painton*, [1894] P. 151; *Adams v. McBeath* (1897), 27 Can. S.C.R. 13; *Fulton v. Andrew* (1875), L.R. 7 H.L. 448. There were many circumstances which were sufficient to arouse the suspicion of the Court, such as the presence of the defendant when the will was being drawn; the fact of his son being a witness; the fiduciary relationship between the testator and the defendant; and the form of the letter written by the defendant to the testator's sister after the death of the testator. The onus of removing these suspicions had not been discharged by the defendant. Undue influence had been shewn; and the will was not that of the testator, but that of the legatee.

Whiting, in reply.

November 25. The judgment of the Court was read by SUTHERLAND, J.:—The plaintiff, Mary Ann Gallagher, is the married sister of Robert Smith, deceased, who died on the 23rd December, 1916, at his home in the township of Wolfe Island, in the county of Frontenac (near the city of Kingston), and who had previously made his last will dated the 18th day of the same month, wherein he appointed the defendant sole executor. The defendant obtained a grant of letters probate on the 4th January, 1917. By the terms of the will, after a direction to the executor for payment of the debts and funeral and testamentary expenses, the testator's real estate, consisting of a farm of 75 acres, valued in the inventory filed in connection with the application to lead grant at \$2,250, and his personal property, including farm implements, livestock, cash in hand and bank, and an insurance policy for \$500, estimated therein to be worth about \$1,900, were disposed of as follows:—

"To my sister Mary Ann the sum of \$1,000; to my executor W. G. Woodman, the remainder of my estate, real and personal, after all my just debts are paid by him."

The farm was probably worth somewhat more than the said estimate, and the amount realised from the insurance policy was less than its face value.

The father of the plaintiff and of the testator was originally the owner of the farm, and they lived on it with their parents. The mother died about 29 years ago and the father 6 years later. The father, by his will, bequeathed the sum of \$500 to the plaintiff, and devised the farm in question to the testator. One year after her father's death, the plaintiff, then a spinster, went to California, and later was married. The testator continued to reside on the farm until his death, and worked it himself, with the exception of a couple of years, when he had a tenant. He remained a bachelor, and was apparently somewhat untidy and uncleanly in his habits. The defendant had known the testator from boyhood, and they had always been good friends. He owned a farm adjoining that of the testator, and lived on it until a few years ago, when he moved a few miles away and went into business, his son George thereafter living on and working it. The testator and the defendant continued on friendly terms. The former sought and obtained, from time to time, from the latter, assistance in some of his business matters, such as the depositing of moneys in the bank. The testator was a man of little education. While the plaintiff had left his home because apparently he would not pay her wages, they were, so far as the evidence discloses, well disposed towards each other, and continued to exchange letters, these being written occasionally for the testator by the defendant. The plaintiff had never returned to Ontario except upon one occasion some 8 years or so before the testator's death, and had then visited him at the farm.

For some years the testator had been ailing, and the defendant and his son George and other neighbours had rendered him assistance with his stock and agricultural work. There can be no doubt from the evidence that he held the defendant in high regard and had confidence in him.

A witness at the trial, one William Gillespie, a lighthouse-keeper, who had known the testator for 40 years, testified that about 12 years ago, when he had occasion to go and see him on business, the testator expressed himself in this way: "He said he did not know how he could get along if it was not for Willie Woodman," meaning the defendant. "When I have a letter to write and I send for him to read my letters, and I hope I will be able to pay him some time; when I get done I calculate that all what I have got will go to him."

App. Div.
1918

GALLAGHER
v.
WOODMAN.
Sutherland, J.

App. Div.
1918
GALLAGHER
v.
WOODMAN.
Sutherland, J.

Dr. William Spankie, an experienced medical man, practising at the village of Wolfe Island, and reeve of the township, who drew the will, also testified that, 3 or 4 months before the testator's death, he had told the witness he wanted to give everything to the defendant. It does not appear that the testator had made any former will. The one in question came to be drawn under the following circumstances:—

The ailment from which he had been suffering for some time was cancer of the stomach, and he had been failing in health. He seemed to have little appetite or desire to eat—as was natural in the case of such a disease. He was, however, up and about, and even tried, until the last few days, to do some of his farm-work, such as partly attending to the feeding of his stock.

George Woodman, son of the defendant, testified that, being away on Sunday the 17th December, 1916, he did not see the testator, as he had been in the habit of doing almost daily. On the Monday following, when he went over to the farm, he found that the testator had not done any of his chores. He then went into the house and found the testator not at all well. He says that he was asked by him to telephone for Dr. Spankie, and did so, but found that Dr. Spankie was not in his office. He then telephoned to his father, the defendant, to hunt him up. The latter did so.

The doctor testified that he was at first reluctant to go, as he had another engagement in Kingston, and in consequence tried to get Dr. Bryant to take his place. Failing in this, he accompanied the defendant, who had hired a team for the purpose. He had attended the testator before, and had come to the conclusion that he had cancer of the stomach, and that his case was hopeless. He said that in the previous summer, on account of the state of the testator's health, he had suggested to him that he should have his will made, and was asked by the testator "to make it for him some time." He had then advised him to go to town and have it done while he was still able to get around. The doctor on the occasion in question took a printed form of will with him. He was cross-examined about this at the trial and testified as follows:—

"Q. Where did you get the form from for the will? A. Oh, I always have forms. I generally buy them at the 'Whig' office; I have got them at the book-store.

"His Lordship: You are asked why you had it there that day.
A. Because Mr. Smith and I had talked about it 3 or 4 months before.

"Q. Of course you usually carry a blank will in your pocket?

"His Lordship: He did on this occasion, because he knew the man wanted his will drawn. That was very natural and proper.

"Mr. McEvoy (counsel for the plaintiff): Do you usually carry a will-blank in your case when you travel? A. No.

"Q. Then you knew when you left the village that there was a strong probability that you would make a will? A. Yes.

"Q. And you knew the man was dying, or going to die soon?
A. Yes.

"Q. And you told Mr. Woodman that? A. No."

He testified further that the defendant had never said anything to him about the preparation of a will or about a will.

The defendant testified as follows:—

"Q. Then did you say anything to the doctor about drawing the will before you took him out? A. I did not.

"Q. Did the doctor say anything to you about it? A. No.

"Q. Then you got there? A. Yes.

"Q. Determined to draw the will; it was determined then to draw the will? A. No, there was nothing said about the will.

"Q. It was drawn? A. He asked the doctor himself. . . .

"Q. You had no idea you were going to draw a will when you got there? A. I did not.

"Q. Nor the doctor either? A. I don't think so. . . .

"His Lordship: Did you and he ever discuss what he was going to do with his property? A. No.

"Q. Never gave you any kind of hint to whom he was going to leave it? A. No."

He did say that on a former occasion the testator had spoken to him about drawing a will; his evidence on this point was as follows:—

"Q. Did you tell my learned friend that he never spoke to you about making a will at all at any time until the day the doctor walked in? A. No, I don't say that.

"Q. When did he speak to you? A. In October, when he had the first sick spell, he asked me if I would go to Kingston with him, said he was going to get his will drew, and the day he went I was busy and I did not get away.

App. Div.
1918

GALLAGHER

v.

WOODMAN.

Sutherland, J.

App. Div.
1918

GALLAGHER
v.

WOODMAN.

Sutherland, J.

"His Lordship: Did he go? A. Yes, he came to Kingston.

"Q. Do you know to whom he went? A. He did not go to anybody.

"Q. How do you know that? A. That was the night he came back and stayed at my place.

"Q. Did he tell you that he had not had his will made? A. Yes, he did."

When the doctor and the defendant arrived at the testator's house on the morning of the 18th December, the former found the testator's condition as described by him at the trial to be as follows:—

"I found him lying on his bed, very much emaciated, very weak, but still able to get up. He did get up, and came out into the other room and sat on the sofa. I talked to him there, talked about his illness. . . so he asked me on that occasion to draw the will for him.

"Q. On Monday, 18th of December? A. Yes; I made a note of it at the time in my day-book.

"Q. What further occurred then? A. I made the will according to his directions.

"Q. Well, what did he say? A. I asked him how he wished to dispose of his property. He said he wanted to give it to William, pointing across the way, William Woodman. I asked him did he wish to give his sister anything—his sister's name was mentioned; he did not seem inclined to give her very much, but finally he agreed to give her \$1,000. I think that was the amount put in the will. At the same time he said that he did not think he should give her so much as that because she had not done anything for him. He mentioned that; I noticed it at the time. Rather a strange remark for a brother to make, I thought. He made that remark, that she had not done anything for him. . . .

"Q. Did he (the defendant) say anything in presence of Smith the day it was drawn when you went down there? A. Mr. Woodman, I think, was in the room part of the time that Smith was talking to me about the will, and my recollection is like this, that Mr. Woodman asked Mr. Smith wouldn't he leave more to his sister, something to that effect, and that is the occasion when Robert Smith said: 'No, I have given her enough; she never did anything for me.'

"Q. Did you say anything to him about giving anything to his sister? A. Mr. Woodman did.

"Q. Did you? A. Not till he made it. Then I wrote it down, and said, 'Is that what you wish to give to your sister?'

"Q. Was there anything said that day about giving \$1,000 and his insurance to the sister? A. Something said about the insurance. He was . . .

"Q. Isn't that in the will? A. Something said about it, discussed about it.

"Q. What was said about it? A. My recollection is that at first thought he would give her the insurance.

"Q. \$290? A. Yes, that was all he wanted to give her.

"Q. And you and William, by a supreme struggle, got him up to the \$1,000? A. No.

"Q. Do you want to take any credit. . .? A. I object to you connecting me with that. Mr. Woodman, the defendant, is the person who got him . . .

"Q. He thought it looked a little too strong, and got him to give the sister a thousand? A. I am not going to put it in that way."

The defendant's version of what occurred is as follows:—

"Q. What was the first that you knew about the preparation of a will on that Monday? A. He was lying on the bed, and he got up and came out in the kitchen and he sat down, and the doctor says, 'How are you feeling?' and Robert says, 'I am feeling better now, but I was pretty sick this morning.' The doctor says, 'We will try and fix you up,' and he was sitting there and he says, 'I would like to have my will drew up,' and asked the doctor if he would draw it, and the doctor said, 'Yes.'

"Mr. McEvoy: You were there when he told Dr. Spankie to give the sister \$1,000 and the rest to you; you heard that? A. Yes, but I did not hear the will read. I went out then and got a witness."

The witnesses to the will were Dr. Spankie and George Woodman junior, and the former tells how the latter came to be a witness:—

"Q. Well, having drawn the will, what then? A. Well, I called on somebody to witness it: the only man around the place was Mr. George Woodman junior, and he was outside, and I

App. Div.
1918

GALEAGHER
v.

WOODMAN.

Sutherland, J.

App. Div.
1918
GALLAGHER
v.
WOODMAN.
Sutherland, J.

sent for him. And I had the will written up, and I called him in to witness it. Mr. Smith wanted Mr. Woodman to come in and witness the will, so I called him." (He did not actually call George himself, but sent the father to do so.)

"Q. George W. the son? A. Yes."

George W. Woodman said:—

"Q. When did you first know about the will? A. That day.

"Q. Where, who told you about it first? A. I was sent to come over and witness the will. I did not know what I was going over to do: Mr. Leigh drove over with the team, and said I was wanted over there. I had been over there back and forth, helping to take care of this sick man, and when I went in the house I was told Mr. Smith wanted to see me, and he and Dr. Spankie was there, and asked me to witness the will.

"Q. What occurred when you went in there? A. In what way do you mean?

"Q. How did you know it was a will? A. Dr. Spankie read it and told me that is what he wanted me to do, to witness this will.

"Q. He read it over? A. Yes.

"Q. Did he say anything to Mr. Smith? A. Yes, he asked Mr. Smith, 'Is this just the way you want this?' and he said, yes, it was.

"Q. And what then? A. Well, that was all there was to it but putting on the signature.

"Q. Anybody sign it? A. Mr. Smith was feeble, and he asked the doctor to sign it for him, and then he put his mark."

It is not shewn that either the testator, the doctor, or the defendant knew that Leigh was about at the time when the doctor, under instructions from the testator, sent for George to come to witness the will. When the defendant went to call George, he could of course have called Leigh to act as a witness instead. It would have been better to have done so.

Some time prior to the 18th December, the testator had employed men occasionally to assist him in his farm-work, one of whom had been at his request hired by the defendant. A man named Arthur Henderson had also been assisting him for a few days, and the defendant testified:—

"I went there on Thursday, and Mr. Henderson had been with him two or three days. The man was not sick abed; he was up

and down; and I went Thursday, and he was up and down, and we fixed up some stuff and took it for him to take, and his bed was clean, and we changed his bed, and Mrs. Brown came, but we could not hire a woman.

"Q. Why could not you hire a nurse? I never saw the day you could not hire a nurse. A. On Saturday we got him promised to go to the hospital; then on Monday morning he was taken bad, and they 'phoned for me, and I took Dr. Spankie, and he said there was no use trying . . .

"Q. If he said there was no use trying to get a nurse, if he did I would like to see the doctor. A. He said there was no use for a woman to go there and stay. . . .

"Q. And before that who had been looking after him? A. Mr. Henderson.

"Q. Who got Mr. Henderson to go? A. I don't know, I did not get him.

"Q. You did not employ him to go there? A. No, sir, I did not.

"Q. Who did? A. He went there himself. . . .

"Q. Had you gone specially to see Smith? A. No, I went down to the farm, and I found he was bad, and Mr. Henderson had been with him a few days, and he had to go to Kingston, and I called and stayed with him from Thursday till Saturday, till Henderson came back.

"His Lordship: When you say 'stayed' you mean stayed at the son's house at night, and went over there in the day? A. Yes.

"Mr. Whiting (counsel for the defendant): Did you stay any night that week with him? A. No.

"Q. Did you think it necessary at all? A. He was sitting up nearly all the time. And lying down. He would go out and in to his bedroom the same as any one.

"Q. You did the chores for him that week? A. Yes.

"Q. Then Henderson came back on Saturday? A. Yes. Then I came up to the village.

"Q. That is 10 miles? A. Yes. . . .

"Q. Then you came away that afternoon, and the doctor came away with you, you brought him back, and then you went and got Watts to go down and look after him and take care of the stock? A. Yes; and we got Mrs. Brown there part of the time.

App. Div.
1918
GALLAGHER
v.
WOODMAN.
Sutherland, J.

App. Div.
1918

GALLAGHER
v.

WOODMAN.

Sutherland, J.

"Q. When did you speak to Mrs. Brown? A. I think the Wednesday.

"Q. Then you went back on the following Wednesday? A. Yes.

"Q. Did you take the doctor along that time? A. The doctor went down with his own car. I went down with him.

"Q. What time did you go down? A. It was right after noon, might have been about 2 o'clock.

"Q. How long did you stay with him that time? A. I think I stayed with him then till he died, but I am not just positive about that. I stayed part of the time, I know that. . . .

"Q. You went on Wednesday, and how many days did you stay? A. I stayed there till Saturday. I stayed down there till after the funeral.

"Q. Where did you stay, at the house with Smith? A. We stayed there at the house part of the time, and at Mr. Brown's, and different ones stayed in the house."

Dr. Spankie also said:—

"Q. Did you know about Watts going down? A. Yes. It was my suggestion that somebody be secured to attend Mr. Smith. He was depending upon neighbours entirely, and I said he should have some person, some orderly, to look after him, and Mr. Woodman said he thought he could get Mr. Watts to come.

"Q. Did you know Watts? A. Yes.

"Q. What did you think about the suggestion of getting him? A. I thought it would be all right: I did not have any objection to it. He had to have somebody; very difficult to get anybody there.

"His Lordship: It is never difficult to get a trained nurse. A. Well, a trained nurse I would not ask a trained nurse to go there."

George W. Woodman says:—

"Q. And I would say, try and get a trained nurse even if it might cost you \$15 a week? A. Well, we did.

"Q. When and where? A. We wanted—we asked him to come to the city where he would be treated, but he would not go. He was obstinate in that way."

From the time of the making of the will on the Monday, to

the testator's death on the Saturday following, food was taken over from George's house for him from time to time, and the defendant testified that he sent delicacies in the nature of oranges, grapes, and cakes for him, and other neighbours apparently sent food, but he was unable to eat anything.

The doctor saw him Wednesday and Saturday; the defendant, his son George, and Watts saw him frequently. Others who were in and out were Mr. and Mrs. Brown, Arthur Henderson, Mr. Irwin, and the minister.

The evidence as to the mental condition of the testator is as follows:—

"Mr. Whiting: Dr. Spankie, what was the mental condition of Mr. Smith at the time? A. Oh, he was perfectly correct that way—sane.

"Q. How did his mind appear as contrasted with when you had seen him the summer before? A. I never saw anything wrong at all about his mind, nothing irrational at any time—never."

George W. Woodman, the other witness to the will, says:—

"Q. What condition was Mr. Smith in mentally at that time? A. Well, first class as far as I could judge. He was reasonably right up till the time of his death, as far as I know."

Watts says:—

"Q. You were hired to go there to look after Bob (meaning the testator) and also to look after the stock? A. Yes.

"Q. So he knew you were there to look after the stock? A. Yes.

"His Lordship: What did Bob say when you told him that? A. He said 'all right.'"

This action was tried by Meredith, C.J.C.P., who came to the conclusion that the will was "really not the last will" of the deceased.

After drawing the will and its execution by the testator, the doctor took it with him, and retained it until the day of the funeral, when he handed it to the defendant. The latter thereupon gave it to his solicitor with instructions to apply for letters probate. On the 27th December, he wrote to the plaintiff, and, amongst others things, said in his letter: "And late years as Robert got older he has consulted with me in everything as he told me a

App. Div.
1918

GALLAGHER
v.

WOODMAN.

Sutherland, J.

App. Div.
1918

GALLAGHER
v.

WOODMAN.

Sutherland, J.

few years ago what he wanted me to do if anything happened to him and I made him a promise that I would and I have always tried to do so and Robert appreciated what I done for him." And again: "I have got a man in charge of things till I hear from you; he had his will made and I was appointed administrator and as the will is in Kingston in the lawyer's office just as soon as I can get to Kingston will have a copy of it sent to you, then you can let me know what you want done as I have done everything so far the way Robert wanted it done."

The plaintiff in her statement of claim alleges:—

"(4) At the time the said deceased made his alleged will, and for some time before, the said defendant was the confidential adviser and manager of the affairs of the said deceased, and the said defendant had thus acquired great influence and control over the mind of the said deceased, who reposed the utmost confidence in the defendant.

"(5) At the time of making the said alleged will, the said Robert Smith, deceased, was wholly under the influence of the said defendant, and acted wholly without any independent advice, and the plaintiff alleges and the fact is that the said alleged will is not the will of the said deceased."

In his judgment, the trial Judge said: "But it is quite clear that that onus of proof which I have mentioned, which is thus put on those who contest the will, is quite displaced by the facts and circumstances of this case. I am inclined to think that the rule laid down in the case of *Fulton v. Andrew*, L.R. 7 H.L. 448, in such strong terms, that the onus of proof of the righteousness of the transaction is upon him who supports the will, applies to this case; but, whether it does or not, the circumstances in this case are so suspicious, so strong against the validity of the will, that I have no manner of doubt that the onus of proving, in an entirely satisfactory manner, that the paper-writing in question is really the last will of Robert Smith, rests upon the defendant, who takes so much under it."

In *Badenach v. Inglis*, 29 O.L.R. 165, at pp. 172 and 189, it was laid down, following *Sproule v. Watson* (1896), 23 A.R. 692, that letters probate issued by the proper Surrogate Court were *prima facie* evidence of testamentary capacity, and that after probate the onus is on the person attacking the will.

In *Barry v. Butlin* (1838), 2 Moo. P.C. 480, it was held that "the onus of proving a will being on the party propounding it, is in general discharged by proof of capacity, and the fact of execution; from which the knowledge of and assent to its contents by the testator will be assumed. The fact of a party preparing a will, with a legacy to himself, is at most only one of suspicion, of more or less weight according to the circumstances, demanding, however, the vigilant care of the Court in investigating the case before granting probate."

In *Fulton v. Andrew*, L.R. 7 H.L. 448, it was held that "those who take a benefit under a will, and have been instrumental in preparing to obtain it, have thrown upon them the onus of shewing the righteousness of the transaction. There is no unyielding rule of law (especially where the ingredient of fraud enters into the case) that, when it has been proved that a testator, competent in mind, has had a will read over to him, and has thereupon executed it, all farther inquiry is shut out."

In *Tyrrell v. Painton*, [1894] P. 151, it was held: "The rule throwing upon the party propounding a will prepared by a person who takes a benefit under it the burden of shewing that the paper propounded expresses the true will of the deceased, is not confined to cases where the will is prepared by a person taking a benefit under it, the true rule to be deduced from *Barry v. Butlin*, 2 Moo. P.C. 480, *Fulton v. Andrew*, L.R. 7 H.L. 448, and *Brown v. Fisher* (1890), 63 L.T.R. 465, being, that wherever a will is prepared and executed under circumstances which raise the suspicion of the Court, it ought not to be pronounced for unless the party propounding it adduces evidence which removes such suspicion, and satisfies the Court that the testator knew and approved of the contents of the instrument."

I am not at all clear that in the circumstances disclosed in the evidence in this case the onus of proof which the trial Judge sought to apply to the defendant was properly placed upon him; but, even if it were, I am of opinion that he has satisfied it. The trial Judge has also held that there was some onus on the defendant to procure independent advice for the testator in the preparation of his will. The learned Chief Justice says in his judgment: "It was quite natural that Smith should rely upon Woodman; and, if I put that reliance just as the defendant deliberately put

App. Div.
1918
GALLAGHER
v.
WOODMAN.
Sutherland, J.

App. Div.
1918

GALLAGHER
v.

WOODMAN.

Sutherland, J.

it in his letter to the plaintiff, it is abundantly sufficient to cast an onus upon him of taking care that the man had ample advice to enable him to make a will of his own. Now, I think that duty was upon the defendant. He may not have known it. I am sure he did not know it, but none the less it was his duty, and that he failed to perform that duty is quite obvious. When the will was executed, instead of sending for or procuring independent advice, he kept the whole matter closely within his own family, and under his own control, so far as it was possible to do so. The doctor was brought there, and, I have no doubt, brought for the purpose of making a will at the defendant's instance."

I am unable to see that the evidence establishes any such relation of confidence between the testator and the defendant as made it incumbent upon the latter to procure for him, in the circumstances disclosed in the evidence, any independent advice. There is nothing to suggest that Dr. Spankie did not act in an entirely impartial and independent manner in taking his instructions for and drawing the will. The trial Judge does not question his honesty. He speaks of him in this way: "Dr. Spankie admits that he took no care of any character." Of course the trial Judge cannot be understood to have meant this literally, as nowhere was Dr. Spankie asked if he had taken "no care" or admitted that he had taken none. What he did is disclosed in the evidence; and it is not, I think, properly open to the comment that he took no care. What the Chief Justice probably meant was that Dr. Spankie had not by his evidence shewn that he had taken the care which, in the Chief Justice's opinion, should have been taken; but (to repeat) the Chief Justice said: "Dr. Spankie admits that he took no care of any character. When I say that, I do it excluding the testimony of the doctor, given at the last moment, as to a conversation he had before, in which Smith had intimated that he intended to give his property to the defendant. I am quite satisfied of the doctor's integrity, but I am also quite satisfied that he is entirely mistaken about that. His hearing is very bad, and I find that his memory is not good, that is, in regard to this transaction."

At the conclusion of his evidence, Dr. Spankie had testified as follows:—

"Q. It never occurred to you, when he said he wanted to give his property to Willie, and Will said, 'Give Mary Ann \$1,000,' it

never occurred to you it was writing down what Woodman wanted?

A. No, because I knew it four months before.

"His Lordship: Before what? A. When Smith came to me complaining about his trouble, I had a talk with him, and I told him then that he should go to see another doctor. I did not want to tell him he had cancer of the stomach, and I said, 'Have you got your will made, do you own that property?' and he said 'Yes,' and I says, 'Don't you want a will?' and he said 'Yes,' he would like to have it drawn up.

"Q. Anything else? A. He did not ask me to do it then. I advised him to consult a lawyer. That was all; only he said he knew how he wanted to dispose of it.

"Mr. McEvoy: That is all you knew except that conversation? A. He knew how he wished to give his property, and mentioned it to me; and he said Mr. Woodman was the only friend he had.

"His Lordship: Can you tell me why you forgot to say that before, why you add that at the last minute; you did not say a word about that? A. He spoke to me about making his . . .

"Q. You did not say a word about making it in favour of Woodman; why didn't you if it is true? Is it accurate that on that occasion in the summer he told you he intended to give his property to Woodman? A. Yes.

"Q. Why didn't you tell us that before, although you have told us the whole story, and said it was the whole story twice? A. He told me more than that; he told me to go to Woodman and get my pay for treating him in a former sickness."

It is apparent that, because of the view of the trial Judge that Dr. Spankie had said that he had told his whole story twice and had not mentioned before the fact that the testator had told him on a previous occasion he wished to give his property to the defendant, he formed the view that the doctor's memory was faulty. I have searched the evidence carefully to see if anywhere Dr. Spankie said twice or even once that what he had testified was the "whole story." He had already testified, not in answer to questions put by his own counsel, but on cross-examination, as follows:—

"Q. But he was so much impressed with William that he wanted to give him everything? A. Well, he mentioned it to me 3 months before.

"Q. When did you see him? A. 3 or 4 months before.

App. Div.
1918

GALLAGHER
v.

WOODMAN.

Sutherland, J.

App. Div.
1918

GALLAGHER

v.

WOODMAN.

Sutherland, J.

"Q. Wasn't it the summer before that? A. He was consulting me about his illness.

"Q. Have you any entry in your book? A. Yes.

"Q. Let us see it—3 or 4 months before? A. I think it was August or September.

"Q. Never mind; he said he wanted to give everything to Willie? A. Yes."

It is apparent that the trial Judge had forgotten this when he had the discussion with the witness already referred to. He seems to have allowed his own error in this respect to have prejudicially affected, in so far as the defendant is concerned, his view of the reliability of Dr. Spankie's memory on a point of some consequence.

In considering the question whether it was likely or not that the defendant unduly or improperly influenced the testator to make the will in question, the fact that he had stated, 12 years before to one witness, and 3 or 4 months before to another, that he had an intention of disposing of his property to a substantial extent in favour of the defendant, is of significance and importance.

The trial Judge goes on further to say: "The doctor was brought there, and I have no doubt brought there for the purpose of making a will at the defendant's instance." Dr. Spankie testified in definite terms that this was not the fact. The defendant testified the same. George W. Woodman in effect corroborates them. There was no other evidence to the contrary. I am unable to see how this finding can be supported. The trial Judge also suggests that some one must have poisoned the mind of the testator against his sister, or he would not have made a will of this kind. He states in his judgment: "It is said that he said, 'Oh, no, nothing to her, she has not done anything for me.'" Nowhere in the evidence does any one say that the testator used this language, "Oh, no, nothing to her." What he did say was (p. 37), according to the evidence of Dr. Spankie, "That he did not think he should give her so much as that because she had not done anything for him." Or, again, he puts it in this way: "That Mr. Woodman asked Mr. Smith would not he leave more to his sister—something to that effect—and that is the occasion when Robert Smith said, 'No, I have given her enough; she never did anything for me.'" I cannot find anything in the evidence to

indicate that any one poisoned the mind of the testator against his sister; and, in so far as the defendant is concerned, the only suggestion that he can be said to have made in connection with the preparation of the will at all was one in her favour, and with a view to induce the testator to make a larger bequest to her than he seemed otherwise disposed to make.

The trial Judge seems to me, if I may say so with deference, to have attached too much importance to the matters which seemed to be suspicious connected with the drawing of the will, and too little importance to the definite evidence leading to the conclusion that it was the will of a competent and uninfluenced testator. It would, no doubt, have been better for a lawyer to have drawn the will; for some other witness than the son to have acted as such; and for the defendant not to have been present when instructions for it were being given, and it was being prepared. It would have been more candid for him, when writing to the plaintiff, after the decease of her brother, to have told her the actual provisions of the will, as he could have done, knowing its contents; but the testimony of Dr. Spankie seems to put it beyond doubt that the testator was competent to give sufficiently definite and explicit instructions for the will in question; that he did so; and that it was drawn in accordance with his instructions.

After a careful perusal of the evidence, I can find nothing to lead to any reasonable conclusion that the defendant had such influence over the testator as would have enabled him to persuade or compel the testator to make a will not in accordance with his own views or intentions, or that he sought to or did use any such influence over him in connection with the will in question. The evidence does not indicate that the testator was a man who was pliable, facile, or easily influenced, but rather the contrary. In reality, there is no evidence that the defendant procured the will to be made, or that it was other than the voluntary act of the testator.

The property to be dealt with was not a large or complicated one. The only relative the testator had was his sister, from whom he had been separated for many years, during which, apart altogether from the manner in which they had separated, his sense of attachment and obligation to her might naturally have been weakened. She is not forgotten in the will, but on the contrary

App. Div.
1918

GALLAGHER
v.

WOODMAN

Sutherland, J.

App. Div.
1918

GALLAGHER
v.

WOODMAN

Sutherland, J.

is given a substantial bequest. The only other person he seemed to have in mind was the defendant, and he is the other and more substantial beneficiary.

This is in entire accord with the intention he had previously expressed to Gillespie and Dr. Spankie on former occasions when the defendant was not present. As to his testamentary capacity, the evidence is clear and uncontradicted. Indeed, upon the argument it was admitted by counsel for the plaintiff that he could not succeed in an attack upon the will upon the ground of lack of testamentary capacity. The testator's mind apparently continued clear to the end. It has been held that to establish a case of undue influence it must be shewn that something amounting to fraud or coercion has been practised on the testator in relation to the will itself: *Baudains v. Richardson*, [1906] A.C. 169.

On the whole, I have come to the conclusion that the trial Judge has drawn inferences which were not justified by the evidence, and his judgment should be set aside, and the will upheld as the true last will and testament of the testator: *Boyse v. Rossborough*, 6 H.L.C. 2; *Martin v. Martin* (1866-9), 12 Gr. 500, 15 Gr. 586; *Parfitt v. Lawless*, L.R. 2 P. & D. 462; *Adams v. McBeath*, 27 Can. S.C.R. 13, at pp. 20 and 21; *McKechnie v. McKechnie's Trustees*, [1908] Sess. Cas. 93; *Sellers v. Sullivan* (1918), 43 O.L.R. 528.

As to the costs, I think the proper order to make, under all the circumstances, is that there shall be no costs of the trial, but that the plaintiff shall pay the costs of the appeal.

Appeal allowed.

1918

Feb. 2.
Nov. 25.

[APPELLATE DIVISION.]

WALSH V. INTERNATIONAL BRIDGE AND TERMINAL CO.

Negligence—Death of Plaintiff's Husband by Falling through Railway Bridge—Construction and Maintenance of Bridge under Authority of Act Incorporating Bridge Company, 4 & 5 Edw. VII. ch. 108 (D.)—Absence of Flooring—Railway Act, 1903, 3 Edw. VII. ch. 58, sec. 180—Order of Board of Railway Commissioners Requiring Gates or Watchmen at Railway Crossing—Non-compliance with—No Statutory or Common Law Duty Owed to Deceased—Findings of Jury—Trespasser—Invitee—Implied Invitation.

The defendant company, incorporated in 1905 by 4 & 5 Edw. VII. ch. 108 (D.), built a bridge over Rainy River from Fort Frances, Ontario, to International Falls, Minnesota. The bridge was in three parts, the viaduct for railways tracks being to the east, then a floored carriageway, and then a floored footway. The plaintiff's husband, who had, on an evening in March, 1917, come by the footway from the Minnesota side to Fort Frances, through the Canadian Customs and Immigration office at the end of the footway, and so into Church street, Fort Frances, had apparently the intention of returning by the bridge; to do so, he should have gone through the office to reach the footway; instead of that, he went upon the railway viaduct, which was not completely floored, and fell between the railway sleepers upon the ice in the canal below, where his dead body was found the next morning. By an order made by the Dominion Railway Board, the defendant company was granted leave to construct and operate its bridge and railway across Church street; the crossing to be protected by gates installed and maintained by the company, and operated both day and night. By a later order, the Board directed that, pending a re-arrangement of the tracks, the company should appoint day and night watchmen to protect the crossing. There were no gates and no watchmen. Section 180 of the Dominion Railway Act, 1903, made applicable to the defendant company by sec. 17 of its Act of incorporation, enacted that "no company shall run its trains over any canal, or over any navigable water, without having first laid, and without maintaining, such proper flooring under and on both sides of its railway track over such canal or water, as is deemed by the Board sufficient to prevent anything falling from the railway into such canal or water, or upon the boats, vessels, craft, or persons navigating such canal or water." In an action under the Fatal Accidents Act, the jury found that the death of the plaintiff's husband was caused by negligence of the defendant company, "by not complying to order of Commission in not putting gates across street and watchmen to guard them day and night and not putting grates over openings at end of ties." The jury also found that the deceased was not guilty of contributory negligence, and assessed the plaintiff's damages at \$5,000, for which amount judgment was given in her favour by the trial Judge:—

Held, reversing the judgment, that the man had no right to go upon the railway portion of the bridge, and the defendant company owed him no duty: the order of the Board as to gates and watchmen and the provision of the statute as to flooring were not made and enacted for the purpose of guarding against such an accident as had happened to him; there was no statutory or common law liability upon the defendant company; and the finding of the jury could not avail the plaintiff.

Stevens v. Jeacocke (1848), 11 Q.B. 731, *Gorris v. Scott* (1874), L.A. 9 Ex. 125, and other like cases, followed.

Held, also, that the man was a trespasser, not an invitee—the doctrine of implied invitation was not applicable.

Walker v. Midland R.W. Co. (1886), 2 Times L.R. 450, followed.

1918

WALSH
v.
INTERNATIONAL
BRIDGE AND
TERMINAL
Co.

ACTION by the widow of William Walsh, under the Fatal Accidents Act, to recover damages for his death. She sued on behalf of herself and three infant children.

William Walsh came to his death by falling through the railway bridge at Fort Frances—a bridge owned and maintained by the defendants.

The action was tried by LENNOX, J., and a jury, at Fort Frances.
C. R. Fitch, for the plaintiff.

A. G. Murray, for the defendant company.

February 2. LENNOX, J.:—The action was tried at Fort Frances. Upon questions submitted, the jury found all the issues in favour of the plaintiff, and assessed the damages at \$5,000. There was evidence upon which the jury could very reasonably find that the defendant company was guilty of negligence causing the fatality; and that which they have assigned, in my opinion, constituted acts of legal negligence. They viewed the locality and the bridge, with the concurrence of counsel on both sides, and they were fully instructed, both during the taking of evidence and in my charge, that the subsequent filling up of the open spaces by gratings was not evidence that the company was negligent before the happening of the accident, but they might consider it as evidence of the practicability of that method of protection. It was not questioned at the trial that the accident occurred in the way described by Dr. Moore; indeed the matter is not open to doubt. The duty of the defendant company to exercise care is not at all the same as it would be if there were two independent structures, and the railway bridge only owned and controlled by the company. It was one structure, with one approach from the town, common to both—the whole structure owned and operated by the company, and both for profit. The deceased was a patron or customer of the company, and the company was bound to exercise reasonable care for his safety.

I think the jury were right in negating contributory negligence. The deceased had been drinking, but, in the opinion of the Customs officer, a very careful, respectable man, he was not in a condition to be dangerous to himself or anybody. If his condition changed while up-town, the change would be a change

towards sobriety, as he could not, as a stranger, get liquor in the town, and he was not carrying a bottle or flask. In any case drunkenness is not in itself contributory negligence. Counsel for the defence distinctly repudiated any suggestion of suicide, when I was about to point out to the jury that criminality is not to be presumed. The circumstances afforded ample evidence on which the jury could reasonably conclude that the deceased *bonâ fide* believed that he was proceeding properly, until it was too late, and, confused by the lights and shadows, fell when he had discovered his error and while attempting to reach a place of safety. Even aside from the evidence of the footprints, and in the absence of any suggestion of suicide, it is a case of *res ipsa loquitur*. The deceased was lawfully upon that part of the bridge used as a railway bridge, if, as a traveller returning from a journey over property of the defendant company, used for profit, he mistakenly and in good faith took the wrong one of two side-walled passages, and the only one with an open end, with the intention of completing his journey; and there is an entire absence of any evidence, direct or circumstantial, to the contrary.

There will be judgment for the plaintiff; but, before it is entered up, the plaintiff must file an affidavit setting out the names, dates of birth, sexes, occupations, and extent of the education of the children of the deceased; and I will then apportion the damages and endorse the record.

The defendant company appealed from the judgment of LENNOX, J.

September 18 and 19. The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

W. N. Tilley, K.C., for the appellant company. There was no negligence on the part of the company; if there was negligence, it was that of the deceased himself, who was a trespasser upon the company's property. The deceased had no invitation to go upon the viaduct part of the bridge: *Walker v. Midland R.W. Co.* (1886), 2 Times L.R. 450. The plaintiff contends that the appellant company was guilty of breaches of both statutory and common law duties. As to the order of the Railway Board to protect the crossing at Church street by gates or a watchman

Lennox, J.
1918
WALSH
v.
INTERNAT-
IONAL
BRIDGE AND
TERMINAL
Co.

App. Div.
1918

WALSH
J.

INTERNAT-
IONAL
BRIDGE AND
TERMINAL
Co.

—even if this order had been carried out, the accident might have happened, because the only duty cast upon the appellant company was to have a gate or watchman when trains were passing. It is the protection of persons on the crossing that is provided for by the legislation. Where a duty is created by a statute for the purpose of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action for damages in respect of such loss: *Gorris v. Scott* (1874), L.R. 9 Ex. 125. The plaintiff alleges want of flooring. Section 180 of the Dominion Railway Act of 1903 deals with this, but in regard to the running of trains, which is not part of the appellant company's business. Besides, the legislation is for the protection of those under the bridge, and not of persons on the bridge. As to the argument that the appellant company should have fenced its track on the side between Church street and the bridge, the appellate company is not subject to the sections of the Railway Act dealing with this matter. As to liability at common law, there is none. There is no common law duty to fence nor to floor a bridge. But the plaintiff contends that the deceased was an invitee. In fact, he was a trespasser, and as such the appellant company owed him no duty: *Grand Trunk R.W. Co. of Canada v. Barnett*, [1911] A.C. 361. No invitation, express or implied, was given to the deceased to use the viaduct: *Wilkinson v. Fairrie* (1862), 1 H. & C. 633.

R. T. Harding and *C. R. Fitch*, for the plaintiff, respondent. The judgment below is right, for the reasons given. There was evidence on which the jury could find the appellant company guilty of negligence causing the accident: *Rowan v. Toronto R.W. Co.* (1899), 29 Can. S.C.R. 717; *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229; *Dickson v. J. A. Scott Limited* (1914), 30 Times L.R. 256. The deceased was not guilty of contributory negligence, even if intoxicated to the extent alleged. The bridge was operated by the appellant company for a profit, and the deceased was a patron and as such was entitled to reasonable safety: *Maclean v. Segar*, [1917] 2 K.B. 325. The appellant company did not comply with the order of the Railway Board to construct a gate across Church street and to maintain a watchman there. If there had been a watchman he would probably have

warned the deceased against going on the viaduct. The appellant company was negligent in not flooring the bridge; it owed a duty to maintain a safe bridge: *Manley v. St. Helens Canal and R.W. Co.* (1858), 2 H. & N. 840. The appellant company also owed the deceased the duty of affording him reasonable safety, as he was an invitee, and not a trespasser: *Shoebottom v. Egerton* (1868), 18 L.T.R. 889.

Tilley, in reply, combatted the suggestion that the deceased had come upon the property of the appellant company as a customer. He was on the wrong part of the bridge for that.

November 25. CLUTE, J.:—The plaintiff is the widow of William Walsh, who came to his death on the 21st March, 1917, by falling through the railway bridge at Fort Frances. She sues on behalf of herself and three infant children.

The bridge, owned and maintained by the defendant company, is a toll bridge for railway passenger traffic and freight between Fort Frances, Ontario, and International Falls, Minnesota.

The Canadian terminal opens upon Church street, the portion used for railway traffic being open and unprotected. The portion reserved for vehicular and foot traffic is enclosed, for vehicles by a gate, and for foot-passengers by a Customs building, through which the latter pass out by a door to the street.

At the time of the accident, the portion of the bridge used for railway purposes was only partly floored; large spaces on each side of the railway track were open and unprotected. The bridge on the Canadian side spans a canal, and at this point is about 60 feet above the level of the canal.

On the night of the 21st March, 1917, the said William Walsh paid his fare and crossed over from the American side, passing through the Customs building on the Canadian side and entering his name. There is no evidence as to what he did or where he went after he passed out from the Customs house. He was found on the ice of the canal, on the Canadian side, under the railway portion of the bridge, immediately below where appeared footprints upon the bridge, about 50 feet from the east end of the bridge.

Dr. Moore, in stating what he saw, said: "There was a mark of some person having gone out on the ties and having looked back and then having gone sideways to the left, that is, coming back

App. Div.
1918

WALSH
v.
INTERNAT-
IONAL
BRIDGE AND
TERMINAL
Co.

App. Div.
1918

WALSH
v.

INTERNATIONAL
BRIDGE AND
TERMINAL
Co.

Clute, J.

towards the Canadian side, and apparently having fallen, making a curved mark to the north 20 or 30 feet—that is, they turned about and came in the reverse direction”—the inference being that he fell through the opening of the bridge.

The plaintiff charges that the bridge was insufficiently lighted; that the defendant company was ordered by the Railway Board of Canada to construct a gate across Church street near the said bridge and to maintain a watchman at that point, but had neglected to comply with that order, and that the defendant was negligent in maintaining the said bridge unfloored and only partly lighted at night, without any means being taken to warn foot-passengers of such danger, and that the proper entrance to the bridge for pedestrians was through a building, the door to which was kept closed with no sign to indicate that it was the entrance for pedestrians to the said bridge; that the defendant well knew the dangerous character of the bridge; and that the manner in which the different entrances were maintained was a standing invitation for those unacquainted with the locality to use that portion of the bridge reserved for railway traffic.

The defendant admits that it owns a railway and traffic bridge, one portion of which is used for railway traffic only, and the other portion is fenced off from the railway portion and is used for the passage of persons and vehicles, for which a toll is charged by the defendant; and it alleges that the bridge is not built on any part of Church street or any other public highway in the town of Fort Frances; that the Government of the Dominion of Canada has established a Customs house and Immigration office at the Fort Frances end of the said bridge, and has erected a gate across the portion of the said bridge used for passenger and vehicular traffic, to prevent persons entering or leaving Canada without examination.

The defendant charges further that, on the night of the 21st March, William Walsh crossed the said bridge from International Falls to Fort Frances, and applied to the Immigration officer for permission to enter Canada for a short time, which was granted, and the said officer informed the said William Walsh that on his return it would be necessary that he should report himself to the Immigration officer then on duty at the said bridge, and that he must enter said bridge through the Customs and Immigration office aforesaid.

The defendant further alleges that Walsh was in an intoxicated condition when attempting to return to International Falls, and refused and neglected to obey the said Immigration officer's instructions; and, although the approach to the said bridge was brilliantly lighted, he apparently attempted to cross on the railway track, and fell from the said bridge to the ice below on the canal and was killed, and that his death was due entirely to his negligence, contributory negligence, and want of care; and that the defendant was not guilty of any negligence or breach of duty in connection therewith.

The jury took a view of the *locus*, which, in the opinion of the Judge, "supplemented very effectively the evidence." No objection was taken to the Judge's charge.

The following are the questions submitted, with the answers thereto:—

1. Was the death of the plaintiff's husband occasioned by negligence of the defendant company? A. Yes.

2. If your answer is "Yes," in what did the negligence of the company consist? State fully. A. By not complying to order of Commission in not putting gates across street and watchman to guard them day and night and not putting grates over openings at end of ties.

3. Notwithstanding the negligence of the company, if any, could the deceased William Walsh, by the exercise of reasonable care, have avoided the accident? A. No.

4. If so, in what did his negligence consist? (Not answered.)

5. Damages? A. \$5,000 and expenses.

Upon these findings, judgment was entered for the plaintiff for \$5,000.

In his reasons for judgment the Judge took the view that there was evidence upon which the jury could very reasonably find that the company was guilty of negligence causing the fatality, and that what the jury have assigned "constituted acts of legal negligence."

The Railway Board, on the application of the defendant, under the Railway Act, made an order, dated the 22nd January, 1912, as follows:—

"It is ordered that the applicant company be and it is hereby granted leave to construct and operate the bridge and railway across Church street in the said town of Fort Frances as shewn

App. Div.
1918

WALSH
v.

INTERNATIONAL
BRIDGE AND
TERMINAL
Co.

Clute, J.

App. Div.
1918
—
WALSH
v.
INTERNAT-
IONAL
BRIDGE AND
TERMINAL
Co.
—
Clute, J.

on the said plan; the applicant company to file new plans for the approval of the Engineer of the Board shewing road allowance 66 feet wide at the approach to the traffic bridge and carrying out the grade so that it will run from 8% to 12% on the street from Church street north to the dock (*sic*); the crossing to be protected by the gates installed and maintained by the applicant company and operated both day and night."

On the 8th March, 1915, the Board made a further order as follows:—

"Upon reading what is filed on behalf of the International Bridge and Terminal Company, and it appearing that there is to be a re-arrangement of the tracks at the point in question:—

"It is ordered that pending the said re-arrangement the International Bridge and Terminal Company be and it is hereby directed to appoint day and night watchmen to protect said crossing; plans of the proposed re-arrangement of tracks to be submitted for the approval of the Board within 30 days from the date of this order."

It is said by counsel that nothing was done towards re-arrangement of the tracks. It is apparent that the orders made by the Board to maintain gates and watchmen cannot help the plaintiff. It was not by reason of neglect of duty in this regard that the plaintiff's husband met his death; that had nothing to do with it, and this finding of the jury cannot sustain the verdict.

The defendant company was incorporated by a statute of the Dominion of Canada (1905), 4 & 5 Edw. VII. ch. 108, intituled "An Act to incorporate the International Bridge and Terminal Company." Section 16 provides that the Companies Clauses Act shall not apply to the company. Section 17 provides that the following sections of the Railway Act, 1903, namely, 51 to 117, both inclusive, 118 except para. (b) thereof, 119 to 195, both inclusive, 206 to 210, both inclusive, 242, 251, 252, 280 to 284, both inclusive, and 303 and 309, shall, so far as applicable and except as they are extended, limited or qualified hereby, apply to the works and undertaking of the company, and wherever in the said sections the word "railway" occurs it shall, for the purposes of the company and unless the context otherwise requires, mean the said bridge.

Having regard to the interpretation clause of the Railway Act, 1903, sec. 2 (c.) and (s.), and secs. 3, 4, and 5, and the Incorporation

Act of the defendant company, I am of opinion that the defendant is *not* a company within the meaning of the Railway Act, and only those clauses of the Railway Act which are made applicable by sec. 17 of the Incorporation Act are to be considered as a part of that Act. The trespass clause of the Railway Act is not included in sec. 17 of the Incorporation Act, and has no application to the present case.

Section 180 of the Railway Act, 1903, now sec. 231 of R.S.C. 1906, ch. 37, provides that "no company shall run its trains over any canal, or over any navigable water, without having first laid, and without maintaining, such proper flooring under and on both sides of its railway track over such canal or water, as is deemed by the Board sufficient to prevent anything falling from the railway into such canal or water, or upon the boats, vessels, craft, or persons navigating such canal or water."

This is one of those sections of the Railway Act which are made to apply to the defendant's Act of Incorporation, by sec. 17. Is there a duty created by this section towards the deceased, the breach of which would give him or his representatives, under the circumstances of the present case, a right of action? The protection is not limited to anything falling upon boats, vessels, or craft, or persons navigating such canal or water, but refers to anything falling into the canal or water or upon the boats, whether any one is injured or not, that is, the running of trains is prohibited under a penalty until such proper flooring is laid as is deemed by the Board sufficient for the purposes indicated. The deceased was not killed by reason of the defendant running trains while the flooring was unaid.

The facts in this case do not create a duty towards the deceased. He had no right to go on the railway portion of the bridge. Section 180 was passed "to prevent anything falling from the railway into such canal or water, or upon the boats, vessels, craft, or persons navigating such canal or water," and not to ensure safety to any one straying by mistake or otherwise on the bridge. The following authorities may be referred to:—

In *Gorris v. Scott*, L.R. 9 Ex. 125, it was held that when a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to

App. Div.
1918

WALSH
v.

INTERNATIONAL
BRIDGE AND
TERMINAL
Co.

Clute, J.

App. Div.
1918

WALSH
v.

INTERNAT-
IONAL
BRIDGE AND
TERMINAL
Co.

Clute, J.

maintain an action in respect of such loss. The defendant in that case, a ship-owner, undertook to carry the plaintiffs' sheep from a foreign port to England. On the voyage some of the sheep were washed overboard by reason of the defendant's neglect to take a precaution enjoined by an order of Privy Council, which was made under the authority of the Contagious Diseases (Animals) Act, 1869, sec. 75; and it was held that, the object of the statute being to prevent the spread of contagious diseases among animals, and not to protect them against perils of the sea, the plaintiffs could not recover.

See also *Stevens v. Jeacocke* (1848), 11 Q.B. 731; *Blamires v. Lancashire and Yorkshire R.W. Co.* (1873), L.R. 8 Ex. 283; *LeMay v. Canadian Pacific R.W. Co.* (1890), 17 A.R. 293, at p. 300.

In Halsbury's Laws of England, vol. 27, p. 192, para. 379, it is said: "The damages recoverable in respect of a breach of statutory duty may either be imposed by the terms of the statute imposing the duty, or be such as are contemplated by the statute, and flow directly from the breach."

The failure to exercise statutory powers or to perform statutory duties only renders a body having such powers or duties liable to a civil action if the statute intended to give a right of action to a person injured by such failure: *Maguire v. Liverpool Corporation*, [1905] 1 K.B. 767 (C.A.)

A public corporation to which an obligation to keep public roads and bridges in repair has been transferred is not liable to an action in respect of mere nonfeasance unless the Legislature has shewn an intention to impose such liability upon it: *Gibraltar Sanitary Commissioners v. Orfila* (1890), 15 App. Cas. 400.

"The harm in respect of which an action is brought for the breach of a statutory duty must be of the kind which the statute was intended to prevent," referring to *Gorris v. Scott*, *supra*: Pollock on Torts, 10th ed., pp. 205, 206. And again, p. 206: "In an action not founded on a statutory duty the disregard of such a duty, if likely to cause harm of the kind that has been suffered, may be a material fact," referring to *Blamires v. Lancashire and Yorkshire R.W. Co.*, *supra*.

Gorris v. Scott is also referred to in Clerk & Lindsell on Torts, 6th ed., pp. 31 and 32, where it is said: "It is not, however, in every case that a party is entitled to maintain an action by reason

of his having suffered some particular damage from which the due fulfilment of some public duty would have saved him. It must further appear that his damage was within the mischief against which the law intended to provide . . . Even, however, where a party has suffered the very damage against which some statutory obligation is provided as a safeguard, he will not necessarily have any right of action. The whole language and scope of the statute must be carefully considered in order to discover whether it was the intention of the Legislature to give by implication such a remedy. (See *Atkinson v. Newcastle Waterworks Co.* (1877), 2 Ex. D. 441.) But the general rule would seem to be that where a statute imposes a penalty for the breach of the duty which it creates there is no right of action. The presumption is that the Legislature considered the penalty sufficient protection. (See *Institute of Patent Agents v. Lockwood*, [1894] A.C. 347; and *per* Lord Hobhouse, *Municipality of Pictou v. Geldert*, [1893] A.C. 524, at p. 525. In such and cognate cases, the question whether an action will lie for breach of a statutory duty probably depends mainly upon the nature of the injury likely to arise from a breach, and the amount and allocation of the penalty imposed. 'If it be found that the remedy provided by statute is to enure for the benefit of the person injured by the breach of the statutory duty, that is an additional matter which ought to be taken into consideration.' But, 'although it may be a cogent and weighty consideration, other matters have also to be considered.' *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402, Vaughan Williams, L.J., at p. 416.")

See also Pollock on Torts, pp. 27 and 28; and see *Ward v. Hobbs* (1878), 4 App. Cas. 13, at p. 23.

The appeal should be allowed and the action dismissed. It is not a case for costs.

App. Div.
1918

WALSH
v.

INTERNATIONAL
BRIDGE AND
TERMINAL
Co.

Clute, J.

MULOCK, C.J. Ex., agreed with CLUTE, J.

RIDDELL, J.:—The deceased lived in Minnesota as a hotel and boarding-house keeper; he came to International Falls, Minnesota, intending to go into business there; when there he came across the river by the defendant's bridge to Fort Frances, Ontario, and returning fell through the bridge and was killed. An action being brought under our statute, judgment was given for his widow, the plaintiff, for \$5,000. The defendant company now appeals.

App. Div.
1918

WALSH
v.

INTERNAT-
IONAL
BRIDGE AND
TERMINAL
Co.

Riddell, J.

The defendant company was incorporated by Dominion legislation (1905), 4 & 5 Edw. VII. ch. 108; in this Act, by sec. 17, certain of the sections of the Railway Act of 1903, 3 Edw. VII. ch. 58, are incorporated.

Under its statutory powers the company built a bridge across the river from International Falls; this was in three parts, the viaduct for the railway tracks being to the east, then a floored carriageway, and then a little higher a floored footway. No foot-passenger on the footway could without great difficulty get upon the railway viaduct, which was not floored. The railway part has its girders on either side, while the traffic parts for carriages and foot-passengers is a kind of extension or annex.

For one crossing to Canada by the footpath it is necessary for him to pass through the Canadian Customs office. The deceased crossing on the footpath passed through the Customs office. The Customs officer describes him as then under the influence of liquor, apparently drunk—"he staggered when he came in the door, and his breath smelt pretty strong of liquor."

The officer questioned his right to enter Canada, and "told him he was pretty drunk to see Fort Frances," but the deceased "told me . . . that I need not be afraid of him or I need not think he was a German spy, that he was prepared to lick all the Germans in the United States," and that "helped to get him by." He wrote his name on the register, and the officer told him he would have to come back to report out. This was about 9.30 p.m. of the 21st March, and after that time he was not seen alive by any witness called, nor have we any indication of where he went or what he did until shortly before his death. In the morning his body was found under the railway part of the bridge, "almost underneath the railway track" on the right hand side, i.e., the west side. From his marks in the snow, it was evident that the deceased, instead of going through the Customs office, as he should have done, had turned in on the viaduct, gone some 60 feet on it, and then turning back had gone a short distance "sideways to the left" and fallen on the ice below between the ends of the ties and the side of the railway viaduct. His watch stopped at 10.35, indicating that the unfortunate man had not remained in Canada quite an hour.

At the trial it was proved that an order had been made by the Railway Board as follows:—

"Upon the hearing of the application, in the presence of counsel for the applicant company, and the reports of the Chief Operating Officer and the Chief Engineer of the Board:—

"It is ordered that the applicant company be and it is hereby granted leave to construct and operate its bridge and railway across Church street in the said town of Fort Frances as shewn on the said plan; the applicant company to file new plans for the approval of an Engineer of the Board shewing road allowance 66 feet wide at the approach to the traffic bridge, and carrying out the grade so that it will run from 8% to 12% on the street from Church street, north to the dock; the crossing to be protected by gates installed and maintained by the applicant company, and operated both day and night."

Church street is a highway crossing the railway tracks a short distance north of the bridge and (substantially) at right angles to the tracks.

There was a later order:—

"Upon reading what is filed on behalf of the International Bridge and Terminal Company, and it appearing that there is to be a re-arrangement of the tracks at the point in question:—

"It is ordered that pending the said re-arrangement the International Bridge Company be and it is hereby directed to appoint day and night watchmen to protect the said crossing; plans of the proposed re-arrangement of tracks to be submitted for the approval of the Board within 30 days from the date of this order."

But the re-arrangement scheme was never proceeded with, and it does not seem necessary to consider the order. In any case, it does not alter or modify my view.

[The learned Judge then set out the findings of the jury, which were asstated by CLUTE, J., *supra*, with the exception of the answer to question 2, which at first read: "By not putting gates across tracks and watchman to guard them" etc.]

It is apparent that the jury thought that the Board had ordered gates across the mouth of the bridge, across the railway tracks; and his Lordship drew their attention to the error, where-upon the jury changed the answer to Q. 2 and made it read thus:—

"A. By not complying to order of Commission in not putting gates across street and watchman to guard them day and night and not putting grates over openings at end of ties."

App. Div.
1918

WALSH
v.

INTERNAT-
IONAL
BRIDGE AND
TERMINAL
Co.

Riddell, J.

App. Div.
1918

WALSH
v.

INTERNATIONAL
BRIDGE AND
TERMINAL
Co.

Riddell, J.

Upon the hearing before us, Mr. Harding, in his very exhaustive argument, contended for a breach by the defendant of both statutory and common law duty, and it will be convenient to consider the argument in that order.

The incorporating Act, by sec. 7, enables the defendant to "construct, maintain and operate a bridge, with the necessary or proper approaches . . . from a point in or near the town of Fort Frances . . . and lay tracks on the bridge . . . " and sec. 118 (f.) of the Railway Act, 1903, made part of this Act by sec. 17, enables them "to make, complete, operate, alter and maintain the bridge" (see last three lines of sec. 17) "with one or more sets of rails or tracks." Consequently, the approach to the bridge over Church street is fairly part of the authorised undertaking—the same conclusion must be reached from a consideration of sec. 175 of the Railway Act, 1903. Accordingly secs. 184 to 186 of the Railway Act apply; and, indeed, the defendant recognised this by applying to the Board and obtaining the order already spoken of—it is bound by that order although it has wilfully disobeyed it.

It was the duty of the defendant to protect the crossing on Church street "by gates installed and maintained by the company and operated both day and night." This does not mean that the gates are to be continuously raised and lowered day and night. The company would have no right to such a course of conduct, and could be indicted for a nuisance if they attempted anything so absurd. The position of a company such as this in respect of a highway is quite different from the position as regards other lands belonging to individuals over which it passes. In the latter case the land may be expropriated and is expropriated, thereby becoming the absolute property of the company; but, as regards a highway, the fee is not required and is not acquired by the company, nor does the company ask or expect to acquire any exclusive right to use any part of it—the track may be "carried upon, along or across an existing highway," but "it is the right of all His Majesty's subjects to go upon any part of the highway, so long as it is not occupied by other passengers or occupants. While, of course, no person has the right to be along the line of the railway during the time the train of the railway company is passing, every person has a right upon such place at any other time, and every person has

a right upon other parts of the highway at all times, except so much as is actually occupied by the passing train:" *Grand Trunk R.W. Co. v. McKay* (1903), 34 Can. S.C.R. 81, at p. 88. The sole power given the company by an order under sec. 186 is to provide by gates and watchmen for the "protection, safety and convenience of the public" at the crossing; and the company could not, on a pretence of protecting the public, debar any one from the crossing except when a train was actually passing or about to pass. Accordingly the only duty cast upon the defendant is to have there a gate or a watchman when trains are passing or about to pass.

Here there is no pretence that any train passed or was expected to pass at any time during the visit of the deceased to Canada—there was therefore no statutory obligation in his favour.

Moreover, it is plain that the whole object of the legislation is the protection of those upon the crossing. Where a duty is created, as this was, by statute, for the purpose of preventing a mischief of a particular kind, a person who by neglect of this duty suffers a loss of a different kind is not entitled to maintain an action for damages in respect of such loss: *Stevens v. Jeacocke*, 11 Q. B. 731; *Gorris v. Scott*, L.R. 9 Ex. 125. "Admit there has been a breach of duty; admit there has been a consequent injury; still the Legislature was not legislating to protect against such an injury, but for an altogether different purpose:" *ib.*, p. 130; "The Act of Parliament was passed *alio intuitu*:" p. 131; see *LeMay v. Canadian Pacific R.W. Co.*, 17 A.R. 293, 300.

Then as to the want of flooring—the argument of the plaintiff is based upon sec. 180 of the Railway Act of 1903.

The answers to the contention are several—the prohibition is against running trains without having first laid and without maintaining proper flooring—there would be no violation of the law in the defendant maintaining its bridge for a century without a flooring—the obligation is on the company which runs the trains. The duty of this company is performed when it has complied with secs. 179, 181, 182, 183.

Moreover, the flooring is to be under and on both sides of the track, sufficient to prevent anything falling from the railway into the water or upon the boats or persons navigating it—plainly for the protection of those below, not for the protection of the "thing" (anything) which might fall. The cases just cited, therefore, apply.

App. Div.
1918

WALSH
v.

INTERNAT-
IONAL
BRIDGE AND
TERMINAL
Co.

Riddell, J.

App. Div.
1918

WALSH
v.

INTERNAT-
IONAL
BRIDGE AND
TERMINAL
Co.

Riadell, J.

These are the acts of negligence found by the jury—much argument, however, was addressed to us upon the alleged neglect of the defendant to fence its track on the side between Church street and the bridge. As to that it is sufficient to say that there is no duty at the common law to fence; and the section of the Railway Act of 1903, imposing that duty upon railway companies, sec. 199 of the Act of 1903, is not incorporated in the company's Act of Incorporation—see sec. 17.

Moreover, the jury have not found that omission negligent—and in any case this duty is imposed only for the benefit of adjoining owners whose cattle or other animals may get on the line from omission to fence: sec. 199 (2); *Conway v. Canadian Pacific R.W. Co.* (1886), 12 A.R. 708, and many other cases in our Courts; *Buxton v. North Eastern R.W. Co.* (1868), L.R. 3 Q.B. 549; *Harrold v. Great Western R.W. Co.* (1866), 14 L.T.N.S. 440; *Dawson v. Midland R.W. Co.* (1872), L.R. 8 Ex. 8; *Matson v. Baird & Co.* (1877), 5 Rettie (Sess. Cas., 4th ser.) 87, at p. 93; *Ricketts v. East and West India Docks etc. R.W. Co.* (1852), 12 C.B. 160; *Midland R.W. Co. v. Daykin* (1855), 17 C.B. 126; *Manchester Sheffield and Lincolnshire R.W. Co. v. Wallace* (1854), 23 L.J.C.P. 85, at p. 87; Thornton on Railroad Fences and Private Crossings (1892), sec. 79, and cases cited from several of the United States.

It is, I think, clear that no action will lie based upon breach of any statutory duty.

We must now look at the common law—for, of course, in the absence of restriction, express or by necessary limitation, a statute does not affect common law rights: *Powell v. Fall* (1880), 5 Q.B.D. 597; *Hilliard v. Thurston* (1884), 9 A.R. 514, at p. 526.

That there is no common law duty to fence appears by the cases already cited; that there is none to floor a railway bridge will probably be admitted by all. The plaintiff's case must rest on the proposition that the deceased was an invitee. If he was a mere trespasser, the action must fail: *Hounsell v. Smyth* (1860), 7 C.B.N.S. 731; *Hardcastle v. South Yorkshire R.W. and River Dun Co.* (1859), 4 H. & N. 67, 74; *Binks v. South Yorkshire R.W. and River Dun Co.* (1862), 3 B. & S. 244. If a bare licensee, he had to take the place as he found it; the only obligation on the defendant was that there should be no trap set for him: *Corby v. Hill* (1858), 4 C.B.N.S. 556; *Gautret v. Egerton* (1867), L.R. 2 C.P. 371;

Bolch v. Smith (1862), 7 H. & N. 736. "If the hole has always been uncovered, and the man walks into it, he has no cause of action:" Addison on Torts, 8th ed., p. 723; "otherwise, a man who allows strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the license:" *per* Willes, J., L.R. 2 C.P. at p. 375.

Was the deceased an invitee? Express invitation he certainly had not, and I think an implied invitation cannot be found in the circumstances of this case. Assuming that sec. 291 of the Railway Act of 1903 does not apply, as it is not incorporated in this company's Act by sec. 17, how can a company which is operating a railway track be considered to have impliedly invited any one to use it, to do what, but for the reason that it is a bridge company and not a railway company, would be a crime? The company knew that, for a foot-passenger to cross, it had provided a perfectly safe way, reached by passing through a building, the Customs office; there was an abundance of light, and no chance of any one who used the slightest care making any mistake; how can it be said that there was any implied invitation? Of course the doctrine of *Indermaur v. Dames* (1867), L.R. 2 C.P. 311, is appealed to, but there the plaintiff was engaged in work for the defendant; the defendant had contracted for the work, and knew that the plaintiff or some other workman would come on the premises; I can find nothing in the facts of this case which would indicate that the defendant knew or ought to have known that any one would be so foolish as to go on the railway viaduct—even such knowledge and implied permission would not be sufficient to fix it with damages: *Caledonian R.W. Co. v. Mulholland*, [1898] A.C. 216, 225; much less to indicate that it impliedly invited the deceased.

It is said that the deceased came upon the property of the company on business in which they were both interested. I do not think so—the company was interested in his using the footpath a distance away from the viaduct—it invited him and expected him to use the footpath, not the viaduct—and to get to the footpath he had no need and could not be expected to go upon the viaduct. It is, of course, not the case that one invited upon a certain part of another's property has a right to go to another part.

App. Div.
1918

WALSH
v.
INTERNATIONAL
BRIDGE AND
TERMINAL
Co.

Riddell, J.

App. Div.
1918

WALSH
v.

INTERNAT-
IONAL
BRIDGE AND
TERMINAL
Co.

Riddell, J.

"A person who strays from the ordinary approaches to a house, and trespasses upon the adjoining land, where there is no path, has no remedy for any injury he may sustain from falling into unguarded wells or pits" there: Addison on Torts, 8th ed., pp. 711, 712. Suppose a man had three shops, one a grocery, next it another, and then a third (say) a blacksmith's shop—could one who wanted groceries claim that he was also invited to go into the third, and complain that he there received an injury?

Walker v. Midland R.W. Co., 2 Times L.R. 450, shews how careful the Courts have been in applying the doctrine of implied invitation. There the deceased was a guest at the defendants' hotel with his wife; shortly after midnight he left his room, intending to go to the water-closet; there were no candles, and the gas was turned down low so that it was hard to see one's way. He mistook the door of a service-room for that of the water-closet, walked some feet into the room, and fell down the unguarded well of a luggage lift. The jury found for the plaintiff, but this was reversed by the Queen's Bench Division, and the reversal sustained by the Court of Appeal and the House of Lords. The House of Lords held that, while the deceased was rightfully on the defendants' property, the duty of taking care of him was "limited to those places into which guests may reasonably be supposed to be likely to go, in the belief, reasonably entertained, that they are entitled or invited to do so." 2 Times L.R. at p. 451.

Applying this test, how could the unfortunate Walsh possibly have a belief reasonably entertained that he was entitled or invited to go on the viaduct?

In *Wilkinson v. Fairrie*, 1 H. & C. 633, the plaintiff, being lawfully on the premises, chose to go wandering around in the dark, and it was held that he ceased to be an invitee—see as to this *Paddock v. North Eastern R.W. Co.* (1868), 18 L.T.R. 60 (Cam. Scacc.)

In *Lewis v. Ronald* (1909), 26 Times L.R. 30, a tradesman delivering goods went to a part of the staircase (which he was rightfully using) which part was not lighted, and he was injured: held that he could not recover.

See, as to such cases, *Driscoll v. Partick Burgh Commissioners* (1900), 37 Sc. L.R. 274.

In *Schofield v. Bolton Corporation* (1910), 26 Times L.R. 230

(C.A.), a child was allowed by the defendants to play in their field—the child strayed through an open gate upon a railway line and was injured; the defendants were held not liable. See *Jenkins v. Great Western R.W. Co.*, [1912] 1 K.B. 525 (C.A.); *Cairns v. Boyd* (1879), 6 Rettie (Sess. Cas., 4th ser.) 1004; *Fleming v. Eadie* (1898), 35 Sc. L.R. 422. The liability of the occupier is only commensurate with the extent of the invitation: *Mackie v. MacMillan* (1898), 36 Sc. L.R. 137; *O'Sullivan v. O'Connor* (1888), 22 L.R. Ir. 467, 476.

Remembering the fact that the toll-keeper for foot-passengers on the American side was separated from the viaduct by a fence, and remembering the condition of Walsh less than an hour before, it seems to me fairly certain either (1) that he was trying to deprive the company of the trifling toll, (2) that he negligently, in his state of intoxication or semi-intoxication, took the railway track deliberately, or (3) that from the same cause he negligently mistook his way. In none of these cases can the company be liable.

I would allow the appeal and dismiss the action with costs.

SUTHERLAND, J., agreed in the result.

KELLY, J.:—This appeal is by the defendant company against the judgment of Lennox, J., awarding the plaintiff \$5,000 damages, on the findings of the jury in their answers to the questions submitted to them.

Briefly the facts before the jury were that the plaintiff's husband, William Walsh, a resident of the United States, on the evening of the 21st March, 1917, crossed over from International Falls, in the State of Minnesota, to Fort Frances, in the Province of Ontario, by means of a bridge between these two points, erected and maintained by the defendant over Rainy River at the Falls.

The bridge is in two parts—the easterly or up-stream part being for the passage of railway trains and cars, and the westerly or down-stream part, which, to outward appearances at least, is joined to the other part, being for the accommodation of vehicular traffic such as carriages, waggons, motor-cars, etc., and along the westerly railing of which, and raised slightly above the floor of the carriageway, is a narrow way for foot-passengers. The bridge is a toll bridge, the collection of the toll for foot-passengers

App. Div.
1918

WALSH
v.

INTERNATIONAL
BRIDGE AND
TERMINAL
Co.

Riddell, J.

App. Div.
1918
—
WALSH
v.
INTERNAT-
IONAL
BRIDGE AND
TERMINAL
Co.
—
Kelly, J.

and vehicles being made at the Minnesota end. The footway at its Canadian end leads into a building used as the Canadian Immigration office, and foot-passengers coming in, after having passed the inspection required by the Immigration officers, pass through the building and, by means of a door at the north-east corner thereof, on to Church street in Fort Frances.

Church street is one of the main streets of the town and leads westerly from the business portion thereof in the direction of the Immigration office, before reaching which it crosses, approximately at right angles, the railway tracks which lead to and cross the railway portion of the bridge. Carriage traffic and foot-passengers from the Canadian to the Minnesota side pass westerly along Church street, crossing the railway tracks and then turning to the left on the portion of the bridge reserved for that class of traffic. At the Canadian end of that part of the bridge, there is a gate across the driveway, which is usually kept closed, except when required to be opened for the passage of vehicles. Persons approaching the Immigration office by way of Church street are thus required to cross the railway tracks, and then into and through the Immigration office on to the footway of the bridge.

Walsh, so far as it appears, had not, previous to the night of the 21st March, 1917, crossed into Canada by means of this bridge, and it is in evidence that the Immigration officers told him, when he was passing through the office into Fort Frances, that on his return he must again pass through the office in order to reach the footway on the bridge. There is no gate or other barrier across the railway tracks at or to the south of the line of Church street, or at the entrance to the railway portion of the bridge.

On the morning of the 22nd March, 1917, Walsh's dead body was found on the ice in the canal beneath the railway bridge, at a point about 40 or 50 feet from its Canadian end, which according to one witness is about 60 feet from Church street. From the time he passed out of the Immigration office on his way into Fort Frances, it is not in evidence that any person saw him; there was nothing to suggest how he came to be on the ice or by what means he reached that place, except footprints upon the snow on the ties or flooring of the bridge, traceable from the northerly (or Canadian) end of the bridge along the bridge for some distance, then turning to the left and somewhat to the north as if about

to retrace his course, when they disappeared just over the place where his body was found on the ice.

At the sides of the railway tracks upon the bridge near the end of the ties there were openings sufficiently large to permit of a body passing through.

On that general statement of facts, the case went to the jury.

The defendant company was incorporated by statute (Dominion) 4 & 5 Edw. VII. ch. 108, with power to construct, maintain, and operate a bridge with the necessary or proper approaches and terminal facilities over the Rainy River from a point in or near the town of Fort Frances, in the Province of Ontario, to a point in or near the town of International Falls, in the State of Minnesota, and to construct and arrange the bridge for the passage of pedestrians, cars and vehicles, and for general traffic purposes, and to lay tracks on the bridge and on its terminal property in or near the said towns for the passage of railway and other cars, and to charge tolls for the passage of cars, vehicles, pedestrians, and general traffic over the bridge, approaches, and terminal property, or for the use thereof.

By sec. 16 of the Act, it was declared that the companies Clauses Act shall not apply to the company; and, by sec. 17, certain sections of the Railway Act of 1903 there specified were made to apply to the works and undertaking of the company, so far as applicable and except as they were extended, limited, or qualified by the Act of Incorporation, it being also declared that wherever in the sections so made applicable the word "railway" occurs, it shall, for the purposes of the Act and unless the context otherwise requires, mean the said bridge.

At the trial, the jury in answer to questions found that Walsh's death was caused by negligence of the defendant "by not complying to order of Commission in not putting gates across tracks and watchman to guard them day and night and not putting grates over openings at end of ties;" they also found that Walsh was not guilty of contributory negligence.

From the language used by the jury, the order of the Commission mentioned in these answers of theirs evidently had reference to an order of the Dominion Railway Board of the 12th January, 1912, by which leave was granted to the company to construct and operate its bridge and railway across Church

App. Div.
1918

WALSH
v.

INTERNAT-
IONAL
BRIDGE AND
TERMINAL
Co.

Kelly, J.

App. Div.
1918

WALSH
v.

INTERNAT-
IONAL
BRIDGE AND
TERMINAL
Co.

Kelly, J.

street; the company to file new plans for the approval of an engineer of the Board shewing road allowances 66 feet wide at the approach of the traffic bridge . . . the crossing to be protected by gates installed and maintained by the company and operated both day and night; and to another order of the Board of the 8th March, 1915, by which, after reciting that it appears that there is to be a re-arrangement of the tracks at the point in question, it was ordered that pending the re-arrangement the International Bridge Company be and it was thereby directed to appoint day and night watchmen to protect the said crossing; plans of the proposed re-arrangement of tracks to be submitted for the approval of the Board within 30 days from the date of the order.

It was stated by counsel, in the course of the trial, that the arrangement never was carried out. The crossing which, by the order of the 12th January, 1912, was ordered to be protected by gates, was the crossing of Church street by the railway tracks, so that persons travelling on that street and desiring to cross over the railway tracks intersecting Church street would be protected against danger from passing trains or cars. The learned trial Judge, appreciating this, in his charge adopted as true the statement that had been made that, if there were gates there, they would not be across the railway track, and he stated that such gates were not intended to wall off the end of the bridge. On the jury returning their answers, as above, to the questions, the learned Judge pointed out to them that it was not clear to him what they meant by "putting gates across the tracks," and he added: "By 'across the tracks' I would mean putting a gate across the railway. As I understand it, the Commission ordered them to be put along the side of the railway . . . I am not saying that that is not the way you ought to answer—that may be perfectly correct—but take it to your room and consider it." The jury did further consider and then stated that the defendant's negligence was in "not complying to order of Commission in not putting gates across street and watchman to guard them day and night and not putting grates over openings at end of ties."

On the findings in this amended form, judgment was given in the plaintiff's favour for \$5,000 assessed by the jury.

The defendant's negligence as so found was thus confined to two separate and distinct acts of omission: (1) not complying with

the order of the Board to put gates across the street, and watchmen to guard them day and night; and (2) not putting grates over openings at the end of ties; by which was manifestly meant the openings at the ends of the ties upon the railway bridge. There is no question of negligence arising from failure to place and maintain a gate or other barrier across the tracks themselves, if indeed such failure could be taken under the circumstances to constitute negligence; there is no finding against the defendant in that regard. What the jury evidently had in mind was that, having been ordered by the Railway Board to erect and maintain gates across the street, for the purpose, no doubt, of preventing persons proceeding along the street from continuing their course across the tracks when trains or cars were running upon or approaching the part of the tracks upon the street, and having failed to do so, and consequently there being no watchmen to guard them, the defendant was, under such circumstances, properly chargeable with negligence towards a person who made his way along the railway tracks outside of and beyond the street, and was there injured. When one considers the purpose of the order, it would not be reasonable to expect that the gates would be lowered, except when trains were passing over or approaching the street.

There is no evidence that, on the night Walsh met with his death, any train or cars crossed Church street, or that, even if gates had been installed, there was on that night any occasion for their being lowered or closed. It has been suggested, however, that, had there been a watchman, he might have prevented the deceased from turning off the street on to the railway tracks, and that this affords justification for the finding against the defendant.

Assuming that a watchman had been stationed at the crossing in compliance with the order of the Railway Board, his duty would have been confined to carrying out the purposes of that order by protecting persons travelling on Church street against danger from trains running upon the street; there would have been no duty upon him to do something not contemplated by the order. How then can it be reasonably urged that the defendant was guilty of a breach of duty based on non-compliance with the order, for an occurrence resulting from something against which the order was not intended to protect?

Where a duty is created by a statute for the purpose of prevent-

App. Div.
1918

WALSH
v.

INTERNATIONAL
BRIDGE AND
TERMINAL
Co.

Kelly, J.

App. Div.
1918

WALSH
v.

INTERNAT-
IONAL
BRIDGE AND
TERMINAL
Co.

Kelly, J.

ing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action for damages in respect of such loss: Underhill on Torts, 7th Eng. (1st Canadian) ed., pp. 47 and 48, citing *Gorris v. Scott*, L.R. 9 Ex. 125.

In the *Gorris* case the defendant, a ship-owner, undertook to carry the plaintiffs' sheep from a foreign port to England. On the voyage some of the sheep were washed overboard by reason of the defendant's neglect to take a precaution enjoined by an order of the Privy Council, made under the authority of the Contagious Diseases (Animals) Act, 1869, sec. 75, and the Court held that the object of the statute and the order being to prevent the spread of contagious diseases among animals, and not to protect them against perils of the sea, the plaintiffs could not recover. In his reasons for judgment, Kelly, C.B., at p. 128, says:—

"If, therefore, by reason of the precautions in question not having been taken, the plaintiffs had sustained that damage against which it was intended to secure them, an action would lie, but . . . when the damage is of such a nature as was not contemplated at all by the statute, and as to which it was not intended to confer any benefit on the plaintiffs, they cannot maintain an action founded on the neglect." And he gives the illustration of the principle in the case of a breach of a duty imposed upon a railway company to erect a gate on a level crossing and to keep it closed except when the crossing is being actually and properly used, the object of the precaution being to prevent injury to animals or vehicles upon the line at unseasonable times, and where by reason of such breach of duty an injury ensues to a passenger, an action will lie against the railway company, because the intention of the Legislature was that, by the erection of the gates and by their being kept closed, individuals should be protected against accidents of that description.

And at pp. 129 and 130:—

"Looking at the Act, it is perfectly clear that its provisions were all enacted with a totally different view" (that is, not with the view to protecting property from being washed overboard or loss by perils at sea); "there was no purpose, direct or indirect, to protect against such damage; but, as is recited in the preamble, the Act is directed against the possibility of sheep or cattle being

exposed to disease on their way to this country . . . The damage complained of here is something totally apart from the object of the Act of Parliament, and it is in accordance with all the authorities to say that the action is not maintainable."

And Baron Pollock (at p. 131) says:—

"Suppose, then, that the precautions directed are useful and advantageous for preventing animals from being washed overboard, yet they were never intended for that purpose, and a loss of that kind caused by their neglect cannot give a cause of action."

All this has application as well to the effect of the finding against the defendant of negligence "in not putting gratings over openings at the end of ties," in so far as that finding is based on any statutory duty imposed upon the company.

By sec. 180 of the Railway Act of 1903 (3 Edw. VII. ch. 58):—

"No company shall run its trains over any canal, or over any navigable water, without having first laid, and without maintaining, such proper flooring under and on both sides of its railway track over such canal or water, as is deemed by the Board sufficient to prevent anything falling from the railway into such canal or water, or upon the boats, vessels, craft, or persons navigating such canal or water."

By the defendant's Act of Incorporation, this section is made to apply to it. The prohibition is against running trains over any canal or other navigable water without providing the protection there required "to prevent anything falling from the railway into such canal or water, or upon the boats, vessels, craft, or persons navigating such canal or water."

Manifestly the object of the section was the protection of persons or property beneath the railway tracks from danger of anything falling from the tracks, and not the protection of anybody who might happen to be upon the tracks. Particularly is this so in the case of tracks upon a bridge which was not intended for use by foot-passengers—where this use was confined altogether to the passage of trains, and where foot-passengers to whom there was no invitation either express or implied had no right to be. The purpose of this legislation was not the protection of persons situate as Walsh was and in the circumstances under which he met his death; no statutory right was imposed upon the defendants to protect him (*Gorris v. Scott*, *supra*).

App. Div.
1918

WALSH
v.

INTERNAT-
IONAL
BRIDGE AND
TERMINAL
Co.

Kelly, J.

App. Div.
1918
—
WALSH
v.
INTERNAT-
IONAL
BRIDGE AND
TERMINAL
Co.
—
Kelly, J.

Nor am I aware of any rule of law, outside of statutory obligation, by which the defendant can be held liable under the circumstances of this case. If, as it has been assumed, the deceased was on his way to recross from Fort Frances to the Minnesota side, his way—the usual way of foot-passengers—was along Church street to the Immigration office, by passing through which he would reach the footway on the bridge.

Earlier in the evening it was drawn to his attention that this was the proper way to return. If there was any invitation from the defendant, either expressed or implied (there is no evidence of express invitation unless the direction given him by those in the Immigration office amounted to it), it was to enter upon their property in the usual way from Church street through the Immigration office.

There is no finding that there was want of proper lighting or that it was an unsafe or an unsuitable way for him to travel. There is the evidence of Dr. Moore, called by the plaintiff, "that the place is very well lighted towards the Customs house" (by which I take him to mean the building referred to elsewhere as the Immigration office) "and that it is lighted from every way, the windows, the bridge and the streets."

The defendant having provided a safe and suitable way for foot-passengers to pass from the public street to the traffic portion of the bridge, I am at a loss to understand how an invitation can be implied to one desiring to cross by means of the foot-bridge, to go upon any other part of the defendant's property clearly not intended or suitable for that class of traffic. For all that appears, the deceased had no good reason for departing from the recognised way provided for foot-passengers, and his presence on the railway portion of the bridge was an act of trespass.

The circumstances in *Walker v. Midland R.W. Co.*, 2 Times L.R. 450—cited on the argument—were much more favourable to the plaintiff's case in that action than are the present circumstances to the present plaintiff; and the judgment there was in favour of the defendants.

In any view of the matter, I am of opinion that the findings of the jury do not support the verdict in the plaintiff's favour.

The appeal should be allowed and the action dismissed—both without costs.

Appeal allowed.

[ROSE, J.]

1918

Nov. 30.

GRANT V. GRANT.

Will—Two Testamentary Documents Executed by Testatrix in Existence at Death—Alterations Made in Earlier Document after Execution without Re-execution—Reference in Later Document to Earlier one—"If the Stroked one Stands Take it"—Later Document alone Admitted to Probate.

In 1910 the testatrix made a will disposing of all her property. Afterwards, she made many alterations in the document by striking out words and interlining others; but did not re-execute as a will the document as altered. In 1916, she duly executed a new will, written by her own hand, beginning: "This is the last will of E. G. if the one stroked over will not stand. If the stroked one stands take it." This will also disposed of all her property, but it differed materially from the will of 1910, both as first written and as subsequently altered:—

Held, that the two documents could not stand together.

In re Hay, Kerr v. Stinrear, [1904] 1 Ch. 317, distinguished, there not being in this case, as there was in that, an express confirmation of the earlier writing.

In its natural signification the expression "the stroked one" in the sentence "If the stroked one stands take it," described the original will as "stroked," and not the original will without the alterations; and the testatrix must be taken to have used the expression in this natural sense.

Thus the will of 1916 must be admitted to probate; for the earlier will was not valid as altered, and the condition upon which the second will was to come into operation was fulfilled—"the one stroked over will not stand."

An instrument which is to take effect as a will only on the happening of a contingency named in it may be valid as a will: *Damon v. Damon* (1864), 8 Allen (Mass.) 192.

ACTION for a declaration as to which of two, or whether both testamentary writings executed by Elizabeth Grant, deceased, should be admitted to probate.

The action was tried by ROSE, J., without a jury, at Cornwall.

R. Smith, K.C., for the plaintiff.

Hamilton Cassels, K.C., for the defendants the Board of Trustees of the Presbyterian Church in Canada.

A. I. Macdonell, for the United Counties of Stormont Dundas and Glengarry.

A. M. Denovan, for the British and Foreign Bible Society.

J. E. Harkness, for Duncan Grant.

R. S. Cassels, K.C., for Margaret O'Hara and Percy C. Leslie.

November 30. ROSE, J.:—In 1910 the testatrix made a will disposing of all her property. At a later time, or at later times, she made many alterations in the document by striking out

Roe, J.
1918
GRANT
1.
GRANT.

words and interlining others; and then, in 1916, she wrote, by her own hand, and duly executed, a new will beginning as follows: "This is the last will of Elizabeth Grant if the one stroked over will not stand. If the stroked one stands take it."

This new will also disposes of all the property of the testatrix, but it differs materially from the one of 1910, both as first written and as subsequently altered. What is sought in the action is a determination as to whether the will of 1910 or that of 1916 or both should be admitted to probate; and, if it be determined that both should be admitted to probate, a declaration as to the effect of the two in combination.

It seems to me to be clear that the two cannot stand together. The words, "If the stroked one stands take it," do not seem to me to be equivalent to "I direct that the stroked one shall stand and be taken as my last will:" they seem rather to mean: "I do not know what the law is. If it is that the will formerly executed by me and 'stroked over' is a valid will, well and good; I shall not make another. But, if that will is invalid, I declare this present writing to be my will." If the words mean what I take them to mean, the case of *In re Hay, Kerr v. Stinnear*, [1904] 1 Ch. 317, cited by counsel, has no application, for there is not here, as there was in that case, an express confirmation of the earlier writing. The two wills, then, cannot be admitted to probate; and there is no need to consider whether, if both were admitted, the effect of the second would be merely to revive the first, or whether there would have to be some attempt so to administer the estate as to give effect to the provisions of each.

The inquiry is thus narrowed to an ascertainment of what the testatrix meant by her direction that if the altered will of 1910 stood it was to be taken. Did she mean that it was to be taken if, notwithstanding the alterations, it was still valid as originally written; or did she mean that it was to be taken if it was valid as altered? If she meant the first, the will of 1910 must be admitted to probate; for the alterations were not made with the formalities requisite to the valid execution of a will, and, if the will of 1916 had not been made, the earlier will would have been admitted to probate in its original form—would have "stood," to use the expression employed by the testatrix. But if she meant that the will of 1910 was to stand if it was valid as altered, the will of 1916

Rose, J.
1918
GRANT
v.
GRANT.

must be admitted to probate; for the earlier will was not valid as altered, and the condition upon which the second will was to come into operation is fulfilled—"the one stroked over will not stand." If authority is needed for the proposition that an instrument can validly be made which is to take effect as a will only on the happening of a contingency named in it, such authority will be found in *Damon v. Damon* (1864), 8 Allen (Mass.) 192, cited by Mr. Denovan.

It seems to me that in its natural signification the expression "the stroked one," in the sentence "If the stroked one stands take it," describes the original will as "stroked," and not the original will without the alterations; and, looking at the whole paragraph, already quoted, in which the sentence occurs, it seems to me to be reasonably clear that the testatrix used the expression in this natural sense. The will of 1910 was, no doubt, in her possession: she did not know what the legal effect of the alterations might be: she desired to refer to the document: she did not speak of it as the will executed in 1910, but gave a description of it as "the one stroked over:" would it not be an undue refinement of her language to treat it as descriptive, not of the document in the plight in which it was when she so described it, but of the document in the plight in which it had been at an earlier time?

There is nothing, either in the will of 1916 or in the changes made in the will of 1910, to indicate that the expression "the stroked one" was used in anything other than what I think is its natural sense. On the contrary, if it is permissible to draw from the state of affairs which apparently existed in 1916 an inference as to the sense in which the testatrix probably understood the expression in question (as to which see *Higgins v. Dawson*, [1902] A.C. 1), the inference would be that she understood the expression to describe the will of 1910 as altered. To illustrate my meaning: In the will of 1910 there was a gift of \$100 to a Mrs. Breese. This was scored out and a note was made that "I Elizabeth Grant gave Mrs. Breese this \$100 in A.D. 1914." There was also a gift of the residue of the estate, including a watch, chain, and brooch, to Dr. Leslie, a missionary in China, for use in his good work. This was scored out and a note was made in the margin, "I gave this in money." If the facts were as stated in these notes, if, before making the will of 1916, the testatrix did give to these

Rose, J.

1918

GRANT

v.

GRANT.

legatees what she had, in 1910, intended to leave to them by will, it is quite improbable that in 1916 she was willing that the will containing the legacies should be operative. Neither of the legatees mentioned takes anything under the will of 1916.

There will be judgment declaring that the will of 1916 is the true last will of the testatrix and ordering it to be admitted to probate. The costs of all parties will be payable out of the estate.

1918

[MASTEN, J.]

Dec. 3.

MASON & RISCH LIMITED v. CHRISTNER.

Sale of Goods—Contract—Musical Instrument of Vendor's Manufacture—Agency of Vendor for Purpose of Selection of Particular Instrument—Revocation by Purchaser before Appropriation to Contract of Particular Instrument—Subsequent Appropriation by Vendor without Assent of Purchaser—Refusal of Purchaser to Accept—Vendor Limited to Damages for Breach of Executory Contract—Measure of Damages—Action for Price of Instrument Based on Special Contract—Failure to Recover because Legally Appropriated Article not Tendered.

No action for the price of goods bargained and sold can be maintained unless delivery has been tendered of a specific article which has been legally appropriated to the fulfilment of the contract.

The defendant agreed in writing to purchase from the plaintiff "one player piano" of the plaintiff's own make, for which the defendant agreed to pay (by instalments with interest) a sum of money and to deliver to the plaintiff "one upright piano." Until the whole of the price of the player piano and interest should be paid, the instrument was to remain the property of the plaintiff; and in case of default or breach the unpaid balance of the purchase-price was to become due at once. "This contract," it was provided, "is not subject to cancellation and contains the whole agreement." The writing was dated the 29th April, 1918. On the 28th May, 1918, the defendant notified the plaintiff that "my order for player piano is hereby cancelled." No completed instrument ready for delivery had then been appropriated to the contract; an instrument was selected by the plaintiff from its stock, but was not finished and ready for delivery until just before the 10th June, 1918, when it was shipped to the defendant, who refused to accept it, and did not pay anything nor deliver the upright piano:—

Held, that the defendant was bound by the contract, and had no right to rescind or refuse acceptance, and the plaintiff was entitled to damages for breach of the contract.

Up to the 28th May the plaintiff was authorised to select, finish, and ship the instrument, but on that date the plaintiff's authority to do so was revoked; the plaintiff was no longer the agent of the defendant for that purpose; and, if the instrument was to be effectively appropriated to fulfilment of the contract, the appropriation must be assented to by the defendant.

The appropriation not having been assented to by the defendant, the plaintiff could not recover the price, but only damages for breach of an executory contract—the actual damages resulting from the breach, i.e., the difference between the contract price and the cost of manufacture, after making due allowance for the value of materials on hand etc.

Unexcelled Fire-Works Co. v. Polites (1890), 130 Penn. St. 536, followed.

The basis of the contract being the delivery by the plaintiff to the defendant of an instrument, it was a condition precedent to the payment of the first instalment of the price, which was by the contract to be on the 1st September, 1918, that there should be a delivery or tender of delivery to the defendant, before that date, of a specific instrument legally appropriated to the contract; and, that condition not having been fulfilled, the \$100 never became payable; and the plaintiff could not sue for the \$100 (and the remainder of the price, invoking the acceleration clause) as upon a special contract.

1918
MASON &
RISCH
LIMITED
v.
CHRISTNER.

ACTION for non-acceptance of goods alleged by the plaintiff company to have been sold by it to the defendant.

The action was tried by MASTEN, J., without a jury, at Chatham.

J. G. Kerr and J. A. McNevin, for the plaintiff company.

R. L. Brackin, for the defendant.

December 3. MASTEN, J.:—The relevant clauses of the agreement upon which the action is founded are as follows:—

“Form 5.

Agreement No.———

“This contract is subject to the approval of Mason & Risch Limited.

“No salesman or agent is authorised to alter this agreement in any way or to make any promise, verbal or written, other than such as may be contained herein.

“I hereby agree to purchase from Mason & Risch Limited (hereinafter called the ‘company’)

“One Mason & Risch player piano style 70 No and combination bench.

“for which I agree to pay five hundred dollars (\$500.00), and in addition to this one upright piano by Heintzman & Co No. 15123.

“with interest at five per cent. per annum on unpaid balances, both before and after maturity, at the office of the said company at as follows: \$100.00 cash Sept. 1st, 1918, then \$75.00 cash each six months thereafter until paid with privilege of paying the whole amount or any portion of the purchase-price before maturity of payments \$10.00 worth of music included

“1. Until the whole of said purchase-price and interest is paid, said instrument shall remain the property of the company but

Masten, J.
1918
 MASON &
 RISCH
 LIMITED
 v.
 CHRISTNER.

shall be at my risk from time of delivery. I agree to insure same, making the loss (if any) payable to the company, and I hereby assign to the company any and all insurance on said instrument which may be taken out by me before the payment to the company of the whole purchase-price.

“3. In case of default of payment of any of the payments mentioned herein, or any extended payment, or any breach of this contract.....the then unpaid balance of purchase-price.....shall forthwith become due.....”

“7. The company may insert the number of said instrument in the space left above for the purpose.

“9. This contract is not subject to cancellation and contains the whole agreement between us, and I acknowledge having received a copy of same.

“Dated at Chatham this 29th day of April, 1918.

“Witness.....John Glassford.....

“Signature, Franklin Christner.

“P.O. address, Chatham, Ont.”

By letter dated the 14th May, 1918, the plaintiff company accepted the defendant's offer. In the course of this letter it says:—

“We have pleasure in telling you that we went very carefully through a large stock of completed instruments at our factory, and we have selected for you one of the choicest instruments in every way that have ever come through our works. The piano is not only above the high standard which characterises every piano of our manufacture in tone and touch, but the case in this instance is a particularly handsome one”

This letter, taken by itself, would indicate that on the 14th May, 1918, a specific instrument had been set aside and appropriated, in complete form, ready for delivery, to the fulfilment of this contract. But from the plaintiff's evidence it appears that such is not the case. In the course of the trial, one Winters, an employee at the head office of the plaintiff, was examined and in his depositions says:—

“Q. What did you do about the selection of an instrument, or what did you cause to be done? A. We took it up immediately

with the factory and had an instrument selected for Mr. Christner, and as soon as it was finished it was shipped.

"Q. Before it was shipped did you get anything out of the way or out of the ordinary? A. I think we got a telegram from Mr. Christner and a telephone message from Mr. Glassford about it."

It is therefore evident that on the 14th May the piano was not ready for delivery, that something further remained to be done to it in order that it might be completed, and that it was not completed until immediately before shipment, which took place on the 10th June. Meantime, on the 28th May, the defendant had telegraphed the plaintiff as follows:—

"Chatham, Ont., May 28, '18. Mason & Risch, Toronto, Ont. Dear Sir: This is to notify you that I hereby cancel my order for Mason & Risch player piano ordered through your local agent Mr. John Glassford. Franklin Christner."

On the same date, the defendant wrote to the agent of the plaintiff a letter as follows:—

"Mr. John Glassford. Chatham, May 27th.

"Dear Sir: This is to notify you that my order for Mason & Risch piano is hereby cancelled and will not accept it under any conditions.

"Yours truly,
"Franklin Christner."

By his statement of defence (para. 2), the defendant sets up "that he was induced to sign the contract referred to in paragraph 3 of the statement of claim by the representation of the agent of the plaintiff (on the strength of which the defendant signed the said contract and without which he would not have signed the same) that the piano player referred to in the said contract was and would be in all respects exactly the same as the player piano manufactured by Heintzman & Company, which representation the defendant says was and is untrue."

The defendant further sets up by way of defence (para. 3) that "under the said contract the defendant is to deliver to the plaintiff an upright piano manufactured by Heintzman & Co., which said upright piano the agent of the plaintiff well knew was the property of the defendant's wife. The day following the signing of the said contract by the defendant, the defendant's wife

Masten,
1918

MASON &
RISCH
LIMITED
v.
CHRISTNER.

Masten, J.

1918

MASON &
RISCH
LIMITED

v.

CHRISTNER.

absolutely refused to permit the defendant to deal off her piano in the manner proposed, thereby rendering it impossible for the defendant to carry out said contract, and thereupon the defendant immediately notified the plaintiff cancelling the said contract."

The defendant has, in my opinion, failed to establish the second paragraph of his statement of defence, and I find against him on the issue of misrepresentation.

The allegations of the third paragraph of the defence are established to my satisfaction by the evidence, and I shall hereafter refer to their effect.

The contract is proved and established. It bound the defendant, who had no right to rescind or refuse acceptance.

The plaintiff is therefore entitled to damages for breach, but I am unable to agree with the contention of counsel for the plaintiff respecting the measure of damages.

That claim as put forward is as follows:—

September 1st—Total cash price due.....	\$500.00
Interest at 5% from date of contract.....	8.40
Damages for conversion of upright piano.....	350.00
	<hr/>
	\$858.40

It is therefore a claim for the full purchase-price as in an action for goods bargained and sold.

I observe, in the first place, that the agreement in question is not strictly an agreement of sale, but an agreement of exchange or barter. The essence of a sale is a transfer from the buyer to the seller for a money consideration, called the price, which the buyer pays or agrees to pay; but, if the consideration for the transfer is, wholly or in part, other goods, the total price not being fixed in money, the transaction is an exchange or barter. That being so, the plaintiff can enforce the contract according to its terms only by an action for specific performance.

But here specific performance is wholly impossible, because the defendant had no title to the Heintzman piano mentioned in the agreement. The plaintiff could therefore recover damages only.

This, however, does not fully determine the question, because as a rule such damages are estimated in the same way as at common law.

The common law principles governing the rights of the parties in the case of a sale of goods are well settled.

"An agreement to sell, or, as it is often called, an executory contract of sale, is a contract pure and simple, whereas a sale, or, as it is called for distinction, an executed contract of sale, is a contract plus a conveyance. Thus, by an agreement to sell a mere *jus in personam* is created, by a sale a *jus in rem* is transferred. Where goods have been sold, and the buyer makes default in payment, the seller may sue for the contract price, but where an agreement to buy is broken, usually the seller's only remedy is an action for unliquidated damages:" Halsbury's Laws of England, vol. 25, para. 225.

Unless it is otherwise agreed, the price of the goods is not payable unless and until the property has passed and they have been delivered, where a delivery thereof is part of the consideration for payment, unless delivery has been excused, but the parties may make any bargain they please varying such conditions.

In the present case it was specially agreed that the property in the player piano should not pass to the defendant until the purchase-price was paid in full, and such a provision does not enable the buyer to repudiate the contract, refuse to receive possession of the article sold when duly tendered, or absolve him from payment of the purchase-price: *Tufts v. Poness* (1900), 32 O.R. 51.

In that case the Court says (pp. 54, 55):—

"The stipulation in the contract by which the property in the goods was to remain in the plaintiff during the term of credit, notwithstanding the delivery of possession to the defendant, and the fact that the plaintiff has given up possession to the defendant, so far as he can, take the case out of the general rule which prevents the vendor from recovering the price where he has not parted with the property in the goods."

But the Court does not discuss or negative in any manner the general rule of law that no action for the price of goods bargained and sold can be maintained unless delivery has been tendered of a specific article which has been legally appropriated to the fulfilment of the contract.

In the case of a contract for the sale of goods to be manufactured, unless it be otherwise specifically agreed, no property can

Masten, J.


1918

MASON &
RISCH
LIMITED
v.
CHRISTNER.

Masten, J.

1918

MASON &
RISCH
LIMITED
v.
CHRISTNER.

pass, and there can be no appropriation to the contract until the goods have been completed and are in a deliverable state. 

In the present case if the manufacturer (the plaintiff) had, in the process of finishing the piano which was selected by it on the 14th May, spoiled it in any way, could he have compelled the defendant to accept the spoiled piano? Would the plaintiff not have been under obligation to complete another piano in a proper manner in fulfilment of the contract?

It is clear that on the 28th May no specific piano had been appropriated to the fulfilment of this contract. I am of opinion that the defendant originally appointed the plaintiff company as his agent and authorised it to select for him out of its stock a piano to fulfill the contract. It is to be noted in this connection that it is specifically provided that the written memorandum of contract "contains the whole agreement between us." The authority to select was therefore no part of the contract. It was outside the written agreement just as much as if the defendant had appointed a third party to select the piano, and such an appointment is revocable.

I think that up to the 28th May the plaintiff company was authorised to select, finish, and ship the piano, but on that date its authority so to do was revoked; it was no longer the agent for the defendant for that purpose; and, if the piano was to be effectively appropriated to fulfilment of the contract, the usual rule must apply, i.e., there must be an appropriation to the contract by the plaintiff, assented to by the defendant.

The result of the authorities in regard to appropriation is summarised in Halsbury's Laws of England, vol. 25, para. 301, as follows:—

"Unless a different intention appears, where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made. But when the appropriation made by one party is not made by the previous authority of the other, a subsequent assent thereto by the latter party is necessary."

This leads me to the conclusion that the piano which was by the plaintiff company completed after the repudiation, and which the plaintiff company assumed to appropriate to the contract after that date, never became a specific article sold to the defendant and which could be effectively tendered to him; the reason being that the defendant never assented to the plaintiff's appropriation.

As no action for the price is maintainable until tender by the seller and refusal by the buyer of a specific article legally appropriated to the contract, the only remedy of the plaintiff is for breach of an executory contract, and its recovery can only be for the actual damages resulting from breach of the contract. This result agrees with the rule as stated in Benjamin on Sale, 5th ed., p. 805:—

“Where the agreement is for the sale of goods not specific, or of specific goods which are not in a deliverable state, or which are to be weighed or measured before delivery—the breach by the buyer of his promise to accept and pay can only affect the seller by way of damages. The goods are still his. He may resell or not at his pleasure. But his only action against the buyer [as a general rule] is for damages for non-acceptance. He can in general only recover the damage that he has sustained, not the full price of the goods.”

In Sedgwick on Damages, 9th ed., para. 752, the rule is laid down that where the defendant repudiates the contract before the manufacture is completed, we have to fall back on the general rule that the measure of damages is the net profits of the contract, that is, the difference between the contract price and the cost of manufacture, after making due allowance for the value of materials on hand etc.

This is supported by the judgment of the Pennsylvania Court of Appeal in the case of *Unexcelled Fire-Works Co. v. Polites* (1890), 130 Penn. St. 536. In that case the defendant ordered from the agent of the plaintiff certain fire-works and celebration goods, to be manufactured by the plaintiff and shipped to the defendant, at specified prices. The goods were shipped on the 15th and 16th May respectively, but on the 6th April the defendant wrote to the plaintiff to cancel the orders, as the defendant did not want the goods, and subsequently he refused to accept them. The Court held that: “When an accepted order for goods, to be shipped to

Masten, J.

1918

MASON &
RISCH
LIMITED

v.

CHRISTNER.

Masten, J.

1918

MASON &
RISCH
LIMITED

v.

CHRISTNER.

the buyer, amounts simply to a bargain and sale of goods not specific, and before they are separated from the bulk and set apart to the vendee, he notifies the vendor not to ship them, such notice is a revocation of the carrier's agency to receive the goods, and a subsequent delivery of them to the carrier will not charge the vendee with their price, his only liability being for damages for refusing to accept them."

But counsel for the plaintiff seeks to avoid this result by suggesting that in the present case the claim arises on a special contract whereby the sum of \$100 became due and payable in any event on the 1st September, 1918, irrespective of anything else. Supplementing this, he relies on the 3rd paragraph of the agreement, whereby, on default in payment of any instalment of the purchase-price, the whole of the unpaid balance becomes forthwith due and payable.

I do not think that argument can prevail. The whole basis of the contract is, in my opinion, the delivery by the plaintiff company to the defendant of a piano. It is true that the contract does not name a date when such delivery must be made—but in such case the law implies a delivery within a reasonable time. I find as a fact that in this case the reasonable time which the law implies did elapse at some time prior to the 1st September, and that delivery on the 1st September would have been unreasonable. I hold that it was a condition precedent to the payment of \$100 on the 1st September that there should have been a delivery or tender of delivery to the defendant, before that date, of a specific piano legally appropriated to the contract. For the reasons already stated, this had become impossible; the piano which was tendered had not been sold to the defendant, and hence the \$100 never became payable.

The contract here under consideration is broadly distinguishable from cases like the shipbuilding cases where the parties have clearly agreed that the buyer shall pay instalments of the price during construction.

I therefore hold that the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the defendant's breach of contract.

At the trial I invited counsel for the plaintiff company, without prejudice to its contention, to give evidence upon which such

damages might be estimated, but he declined so to do, preferring to rest his case strictly upon the pleadings as drawn.

I therefore direct judgment for the plaintiff declaring that the contract has been established, that the defendant has committed a breach of his contract, and referring it to the Master at Chatham to take an account of the loss directly and naturally resulting in the ordinary course of events from the defendant's breach of contract.

On confirmation of the Master's report, judgment will be entered in the action for the amount found due by the report without any motion on further directions.

The plaintiff company will recover from the defendant its costs of the action down to and inclusive of the trial, and no costs of the reference will be allowed to either party.

[APPELLATE DIVISION.]

BASIL V. SPRATT.

Conspiracy—Assault—Attempted Removal by Force of Member of Religious Society from House of Society to Lunatic Asylum—Actionable Wrongs—Findings of Special Jury—Liability of Several Defendants—Roman Catholic Episcopal Corporation—Corporation Sole—Incorporating Act, 8 Vict. ch. 82, sec. 6—Capacity of Corporation—Extension of Powers of Corporations by Ontario Companies Act, sec. 210 (6 Geo. V. ch. 35, sec. 6)—Liability of Society Incorporated under Ontario Benevolent Societies Act, 37 Vict. ch. 34—Power to Authorise forcible Removal of Member—Effect of Resolution of Council of Society—Acts of Chief Officer of Society—Personal Liability—Participation of Bishop of Diocese and Physician—Admission of Evidence of Acts Committed after Assault—Examination for Discovery—Evidence at Trial—Rule 330—Damages—Defendants not Acting in Good Faith—Punitive Damages—Separate Assessments against Several Defendants—Consent of all Parties.

The plaintiff, a member of an incorporated charitable society in connection with the Roman Catholic Church in the diocese of Kingston, brought this action against S. (Archbishop of Kingston), the Roman Catholic Episcopal Corporation of the Diocese of Kingston, R. (the Superior General of the charitable society), the society itself, P., a physician, and certain other persons, to recover damages for conspiracy to deprive the plaintiff of her status as a member of the society and to compel her to leave it, for an assault committed upon her with the view of taking her by force to a lunatic asylum, compelling her by force to leave the house of the society in which she lived, and depriving her of her rights as a member of the society. The action was tried by a Judge and a special jury, who found that the defendants S., the Episcopal Corporation, R., and the society authorised the removal of the plaintiff from Kingston to Montreal for the purpose of confining her in an insane asylum; that there was no justification or excuse for such removal; that the defendant P. was responsible, as an accomplice, for the attempted removal of the plaintiff, by issuing the alleged authority and arranging to have a constable on hand when the time came for the removal of the plaintiff. The jury assessed the plaintiff's damages against the four defendants first named at \$20,000 and against the defendant P. at \$4,000:—

Masten, J.

1918

MASON &
RISCH
LIMITED
v.
CHRISTNER.

1917

Dec. 8.

1918

Dec. 6.

1917-18

BASIL
v.
SPRATT.

Held, that the statute of Canada 8 Vict. ch. 82, by which the Bishop of Kingston was created a corporation sole for the purpose of acquiring and holding land for the general use, eleemosynary, ecclesiastical, or educational, of the religious community within his diocese, did not (see sec. 6) vest in the corporation any spiritual jurisdiction or ecclesiastical rights; the corporation was not liable for the acts of R. in regard to the plaintiff; and as against the corporation the action failed (FERGUSON, J.A., dissenting).

The council of the society of which the plaintiff was a member adopted a resolution to the effect that it was necessary to remove her from the house in Kingston to the hospital in Montreal:—

Held, that this resolution afforded no ground for a finding that it conferred or assumed to confer upon the defendant R. authority to remove the plaintiff by force; if it authorised anything to be done it was to be done by lawful means; the act done was one that the society had no authority to do; the law would not imply against the society that it gave authority to its officers to do that which itself had no right to do; and the case against the society also failed (FERGUSON, J.A., dissenting).

Held, also, that there was evidence which, if believed, warranted the jury in coming to the conclusion that the defendants S. and P. were active participants in the wrongful act of the defendant R. in assaulting the plaintiff with a view to taking her against her will to Montreal.

Held, also, that evidence of acts committed after the assault upon the plaintiff was relevant and properly admitted at the trial.

It was argued that the ruling of the trial Judge as to the admission in evidence of the examination for discovery of the defendant S. was erroneous—that the whole of the examination, so far as it related to a certain conversation, parts of which had been read, should have been read:—

Held, that the contention was not well-founded: under Rule 330, when a part of an examination is being read, counsel for the opposite party, desiring to have other parts of the examination read, must point out the parts.

Held, also, that, while the damages were large, the case was one which—in the view which the jury must have adopted, viz., that the defendants were not acting in good faith or under a belief that they were doing what they had a right to do—warranted the jury in awarding punitive damages, and the Court could not interfere.

Semble, there is no reason why, if all parties consent, the jury may not assess the damages against the several defendants respectively.

McLean v. Wokes (1914), 7 O.W.N. 490, followed.

Dictum in London Association for Protection of Trade v. Greenlands Limited, [1916] 2 A.C. 15, at pp. 32, 33, dissented from.

Per FERGUSON, J.A.:—There was evidence on which the jury might find that the defendant society had authorised the removal by force of the plaintiff from the house of the society; and both the society and the corporation had corporate capacity to authorise such a removal.

Reference to the provisions of the Benevolent Societies Act, 37 Vict. ch. 34 (O.), under which the society was incorporated; sec. 210 of the Ontario Companies Act, R.S.O. 1914, ch. 178 (6 Geo. V. ch. 35, sec. 6); *Bonanza Creek Gold Mining Co. Limited v. The King*, [1916] 1 A.C. 566, 584, 585; and *Edwards v. Blackmore* (1918), 42 O.L.R. 105.

THE plaintiff, who was a member of the defendant society, the Sisters of Charity of the House of Providence, brought this action against M. J. Spratt, Archbishop of Kingston, the Roman Catholic Episcopal Corporation of the Diocese of Kingston, Mary Francis Regis, the Sisters of Charity of the House of Providence, Daniel Phelan, John Naylor, Mary Vincent, Mary Magdalene, and Mary Alice, to recover damages for conspiracy to deprive the plaintiff of her rights as a member of the defendant society, for assault, false and malicious arrest, etc.

November 13, 14, 15, 16, and 17, 1917. The action was tried by BRITTON, J., and a special jury, at Kingston.

W. N. Tilley, K.C., and *A. B. Cunningham*, for the plaintiff.

D. L. McCarthy, K.C., and *T. J. Rigney*, for the defendants.

1917
BASIL
v.
SPRATT.

December 8, 1917. BRITTON, J.:—This is an action for damages for alleged false and malicious arrest of the plaintiff for the purpose of having her placed in an hospital for the insane or in some other institution in the Province of Quebec.

This is a somewhat singular case, and one of considerable importance.

The plaintiff, in leading up to the assault upon and arrest of her, begins with her report to the Mother Superior, made on the 18th April, 1916, in reference to alleged maladministration of the affairs of the Orphanage at St. Mary's-on-the-Lake, and in reference to other matters, and she alleges that, by reason of this report and of her informing the Archbishop of its contents, she incurred the ill-will of the Archbishop and Mother Mary Francis Regis, and that the Archbishop and Mother Mary Francis Regis entered into a conspiracy with Dr. Daniel Phelan and others to "damnify" her and to "nullify" the effect of her communication, and to accomplish this they caused the plaintiff to be arrested, and attempted to take her away, with a view to putting her into an insane asylum in or near Montreal.

The first part, therefore, of the plaintiff's complaint was for the assault upon her and for the unlawful arrest; then she branches out into how she lived and what was done at Belleville.

At the trial, on the opening of the case, the defendants' counsel moved, on notice, for an order striking out a great part of the plaintiff's statement of claim, because, as alleged, it was embarrassing.

It was my opinion that the different allegations in the statement of claim were somewhat embarrassing; but, inasmuch as a special jury had been selected and empanelled and a large number of witnesses on both sides had been subpoenaed and were present in Court, and as the statement of defence was only a general denial, in the exercise of my discretion I dismissed the application, and the trial proceeded.

At the close of the plaintiff's case, Mr. McCarthy moved for a nonsuit or a dismissal of the action as against the Roman Catholic

Britton, J.

1917

BASIL

v.

SPRATT.

Episcopal Corporation of the Diocese of Kingston and the Archbishop of the Diocese of Kingston and Dr. Daniel Phelan. I reserved my decision. Counsel for the defendants then called witnesses and gave evidence, subject to his objection. At the close of the evidence Mr. McCarthy renewed his motion; for further particulars of the said motion and arguments thereon, see the notes of the reporter, which no doubt set out the matter fully.

I decided to submit certain questions to the jury, and the questions put and the answers are as follows:—

“1. For what purpose was the plaintiff being taken from Kingston to Montreal? A. To confine her in an insane asylum.

“2. Which, if any, of the defendants authorised the removal? A. M. J. Spratt and the Roman Catholic Episcopal Corporation of the Diocese of Kingston, Mary Francis Regis, and the Sisters of Charity of the House of Providence.

“3. Was there any justification or excuse for such removal? A. No.

“4. If so, what was the justification or excuse? A. None.

“5. Was the defendant Phelan in any way responsible for the attempted removal of the plaintiff? A. Yes.

“6. If so, in what way did he make himself responsible? A. As an accomplice, by issuing the alleged authority and arranging with Chief of Police to have Constable Naylor on hand when the time came for the removal of plaintiff to asylum.

“7. Did the defendant Naylor, at the time he entered the plaintiff's room, have reasonable grounds for believing the plaintiff was insane? A. Yes. Q. If so, did he later know, or should he have known, that she was not insane? A. Yes. Q. If so, when? A. After she quieted down in the room on the promise of being allowed to see Father Mea.

“8. How do you assess the damages? A. Twenty thousand dollars (\$20,000.00) on the defendants as named in clause No. 2. Four thousand dollars (\$4,000.00) on the defendant Dr. Phelan. Policeman Naylor, *nil*.”

These questions were submitted and agreed to by counsel on both sides.

The point raised is of considerable importance; the objection itself is based upon the statute incorporating the Roman Catholic Episcopal Corporation of the Diocese of Kingston, ch. 82, 8 Vict.,

statutes of Canada 1845—it being contended that, the statute of incorporation having been passed for the purpose of enabling the corporation to hold, buy, sell, lease, and otherwise deal with lands, there was no power on the part of the Archbishop to do anything in reference to such matters as the plaintiff complained of, so as to bind the corporation itself.

Section 6 of the Act is as follows:—

“Nothing in this Act contained shall extend or be construed to extend in any manner to confer any spiritual jurisdiction or ecclesiastical rights whatsoever upon either of the said Bishops hereinbefore mentioned, or upon his or their successor or successors, or other ecclesiastical person of the said Church or Churches in communion with the Church of Rome aforesaid.”

Upon the whole case and as it stands, I am of the opinion that there was evidence to go to the jury of such action by the Archbishop as would bind the Roman Catholic Episcopal Corporation of the Diocese of Kingston.

I have not overlooked the limited rights and powers of a corporation sole.

I speak now only as to the right of action of the plaintiff for the assault committed upon her; she had unquestionably a right of action against any one who joined or assisted in the assault committed, and there was evidence as to a part taken in it by the Archbishop.

He may, as the administrator of the affairs of the diocese, in dealing with the plaintiff, be asserting rights of the corporation itself, and in so asserting rights have incurred liabilities.

A mere holding corporation could not successfully put forward the proposition of non-liability for acts of wrongdoing, when such acts had been performed with the sanction of the officers of the corporation, although beyond the express powers of the corporate body.

All this was covered, and perhaps more, by the questions submitted to and answers given by the jury.

• It appears to me that there is some evidence that should be submitted to the jury, and so the case should not be withdrawn, by me, from them.

There will be judgment upon the answers to the questions submitted to the special jury.

Britton, J.

1917

BASIL
v.
SPRATT.

Britton, J.

1917

BASIL
v.
SPRATT.

Judgment will be for the plaintiff against the defendants M. J. Spratt, the Roman Catholic Episcopal Corporation of the Diocese of Kingston, Mary Francis Regis, and the Sisters of Charity of the House of Providence, for \$20,000 damages with costs, and against the defendant Dr. Daniel Phelan, for \$4,000 without costs, and dismissing this action as against the defendants John Naylor, Mary Vincent, Mary Magdalene, and Mary Alice, without costs.

The defendants M. J. Spratt, the Roman Catholic Episcopal Corporation of the Diocese of Kingston, Mary Francis Regis, the Sisters of Charity of the House of Providence, and Daniel Phelan, appealed from the judgment of BRITTON, J.

September 26, 27, and 30, and October 1. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

D. L. McCarthy, K.C., and *T. J. Rigney*, for the appellants, argued that the Act constituting the Bishop of the Roman Catholic diocese of Kingston a corporation sole was simply what might be called a land-holding Act, and conferred no ecclesiastical jurisdiction. The corporation could not, therefore, be liable for the acts for which damages are sought in this action. The case must also fail as against the Society of the Sisters of Charity of the House of Providence, whose powers under their constitution would not enable them to authorise the removal of one of their members except by lawful means. Evidence should not have been admitted of alleged acts of persecution subsequent to the occurrences of the 14th September, to which alone the questions put to the jury and their answers had reference. There is no evidence against the defendant Phelan to shew that he authorised or was otherwise responsible for the attempted removal of the plaintiff. As regards the defendant Spratt, there is no evidence to shew that he authorised the removal in any way, and, in any event, the episcopal corporation cannot be made liable for any act done by the Bishop in his spiritual capacity. The fact that the Archbishop told Father Mea that he was "interfering with his (the Archbishop's) jurisdiction," is not sufficient to connect him with the assault, and it was not open to the jury to draw the inference that they did,

based as it was on mere suspicion and hearsay. The damages awarded are grossly excessive, and the claim for them is based upon acts done subsequently to the assault, which were not the subject of the questions submitted to the jury. The improper admission of evidence as to these acts is ground for a new trial.

W. N. Tilley, K.C., and *A. B. Cunningham*, for the plaintiff, the respondent, argued that whatever the defendant *Spratt* did, he did in his character of Archbishop. The statute did not give a full definition of his powers or functions, but simply added to them, and defined his powers as to holdings and dealing with real estate. The corporation sole has no existence separate from the person holding the episcopal office. [MAGEE, J.A., referred to *Ruitz v. Roman Catholic Episcopal Corporation of Sandwich* (1870), 30 U.C.R. 269.] Counsel referred to *Grant on Corporations* (1850), pp. 626, 632, 633, 635, and to sec. 210 of the Ontario Companies Act, added by 6 Geo. V. ch. 35, sec. 6. The statements made by the Archbishop to Father Mea might well lead to the inference that he was threatening to put the plaintiff in a lunatic asylum, and the jury were entitled to draw such an inference. It would have been a good thing to have had the Archbishop in the witness-box, for there is great difficulty in getting frank, open communications from subordinates. The damages awarded are not excessive, in view of the circumstances of the case, and there is no reason for interfering with the jury's award in respect of them. [MAGEE, J.A., referred to *Archer v. Society of the Sacred Heart of Jesus* (1905), 9 O.L.R. 474.]. On the question of the separate assessment of damages, they referred to *London Association for Protection of Trade v. Greenlands Limited*, [1916] 2 A.C. 15; *McLean v. Wokes* (1914), 7 O.W.N. 490. [MEREDITH, C.J.O., referred to *Crane v. Hunt* (1895), 26 O.R. 641, 648.] Reference was also made to *Taff Vale R.W. Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426; *Mersey Docks Trustees v. Gibbs* (1866), 11 H.L.C. 686; *Bainbridge v. Postmaster-General*, [1906] 1 K.B. 178; *Mulliner v. Midland R.W. Co.* (1879), 11 Ch.D. 611, 623.

McCarthy, in reply, referred to *Power v. Banks*, [1901] 2 Ch. 487; *Halsbury's Laws of England*, vol. 8, para. 690, p. 305. There is no evidence of any animosity displayed by the Archbishop against the plaintiff, and his attitude throughout is a consistent one, devoid of any hostility to her. His remark to Father Mea

App. Div.
1918

BASIL
v.
SPRATT.

App. Div.
1918
—
BASIL
v.
SPRATT.

that he was "interfering with his administration," meant only that, if interference was necessary, he, the Archbishop, was the proper person to interfere.

December 6. MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment, dated the 8th December, 1917, which was directed by Britton, J., to be entered upon the findings of the special jury at the trial at Kingston on the 13th, 14th, 15th, 16th, and 17th days of November, 1917.

The action is brought to recover damages from the defendants, who are M. J. Spratt, Archbishop of Kingston, the Roman Catholic Episcopal Corporation of the Diocese of Kingston, Mary Francis Regis, the Sisters of Charity of the House of Providence, Daniel Phelan, John Naylor, Mary Vincent, Mary Magdalene, and Mary Alice.

The case made by the respondent in her pleadings is that she was a member of the Sisters of Charity of the House of Providence, and that a conspiracy was entered into between the appellants or some of them to deprive her of her status as a member of the society and to compel her to leave it, and that in pursuance of and carrying out the conspiracy she was assaulted with the view to taking her by force to a lunatic asylum in Montreal, and was by the conduct of these appellants compelled to leave the house of the society in which she lived, and as a member of the society was entitled to live, and that the result has been that the respondent has been deprived of her rights as a member of the society, including her right to be supported and maintained during the remainder of her life.

Questions for submission to the jury were prepared by counsel and were adopted by the learned trial Judge in substitution for questions which he had himself prepared.

These questions and the answers of the jury to them were as follows (set out above).

Upon these answers judgment was directed to be entered against the appellants for the amount of the damages assessed against them respectively, with costs; and the action was dismissed as against the defendants Naylor, Mary Vincent, Mary Magdalene, and Mary Alice; and against the judgment entered against the other defendants, their appeal is brought.

The grounds of appeal are:—

1. That there was no evidence to connect the defendants M. J. Spratt and the Roman Catholic Episcopal Corporation of the Diocese of Kingston with the acts as alleged in the plaintiff's statement of claim.

2. That there was no evidence to connect the defendant Phelan with the acts as alleged in the plaintiff's statement of claim.

3. That there was no evidence to connect the Sisters of Charity of the House of Providence with the acts as alleged by the plaintiff in her statement of claim, and the defendant Mary Francis Regis had no authority to act on behalf of the defendants the Sisters of Charity of the House of Providence in authorising the said acts, and the plaintiff's action as against the above-named defendants should be dismissed with costs.

4. That the damages were excessive, and unwarranted by the evidence.

5. In the alternative the defendants complain that under the circumstances it was impossible to obtain a fair trial before a jury, for the following reasons:—

(a) That a jury could not distinguish the evidence which was applicable to one defendant as distinct from another, and the learned Judge failed to properly point out to them and distinguish between the evidence which was applicable to one as distinguished from those portions of the evidence which were applicable to others.

(b) That the plaintiff's statement of claim was embarrassing and irrelevant, and the publication of the same in full in the local papers prejudiced the defendants in obtaining a fair trial of the action, and the action should have been disposed of without a jury.

(c) That the demonstrations in the court-room were prejudicial to the fair trial of the action as against the defendants, and the publication in the local papers during the course of the trial warranted the learned Judge in striking out the jury notice, and that the learned trial Judge improperly submitted (*sic*) evidence which was irrelevant and embarrassing and which must have prejudiced the defendants in the eyes of the jury and prevented a fair trial of the action.

(d) And upon grounds appearing in the objections taken by counsel on behalf of the defendants during the course of the trial.

I will deal first with the question of the liability of the appellant

App. Div.
1918

BASIL
v.
SPRATT.

Meredith, C.J.O..

App. Div.
1918

BASIL
v.

SPRATT.

Meredith, C.J.O.

the Roman Catholic Episcopal Corporation of the Diocese of Kingston.

The Roman Catholic Episcopal Corporation of the Diocese of Kingston in Canada was created by 8 Vict. ch. 82, and it was contended by counsel for the respondent that the effect of it was to vest in the corporation all the ecclesiastical and sacerdotal powers and authority of the Bishop of Kingston—in other words, that everything done by the Bishop in the exercise of his episcopal authority or functions was an act done by the corporation.

I am of opinion that that is not the effect of the Act, but that its purpose and effect were to create a corporation for the purpose of exercising the powers conferred by the Act. It is true that the Bishop of Kingston and his successors in office are created a corporation and are to have perpetual succession, but sec. 6 provides that “nothing in this Act contained shall extend or be construed to extend in any manner to confer any spiritual jurisdiction or ecclesiastical rights whatsoever upon either of the said Bishops hereinbefore mentioned, or upon his or their successor or successors, or other ecclesiastical person of the said Church or Churches in communion with the Church of Rome aforesaid.”

While the language of sec. 6 is not well-chosen, it appears to me that it was designed to prevent that which it is contended by the respondent's counsel the Act does—the vesting in the corporation any spiritual jurisdiction or ecclesiastical rights; and that, although it is said that they are not to be conferred upon “either of the said Bishops,” what is meant is, that they are not to be conferred upon them in the corporate status which the Act gives them. Any other reading of the section would, in my opinion, render it useless, if not, indeed, senseless.

In effect the Act creates the Bishops of Kingston and Toronto corporations for the purpose of acquiring and holding land for the general use, eleemosynary, ecclesiastical, or educational, of the Church of Rome or of the religious community or any part of it within their respective dioceses, with the right, having obtained the consent for which sec. 5 provides, to sell, exchange, lease, or otherwise dispose of the land.

I am of opinion, therefore, that the respondent's action as against the corporation fails, and that it should have been dismissed.

The question as to the liability of the Sisters of Charity of the

House of Providence at Kingston for the acts of which the respondent complains, presents other considerations.

This society was incorporated under the authority of the Act respecting Benevolent Provident and other Societies (37 Vict. ch. 34).

App. Div.
1918

BASIL
v.
SPRATT.

Meredith, C.J.O.

As these Sisters of Charity had been established before the passing of the Act, they, in conformity with the provisions of sec. 5 of the Act, annexed to the declaration which they filed, a copy of the constitution of the society.

The society is practically a self-governing one, and there is nothing in its constitution which vests any control over it in the Bishop of Kingston, save only that his consent to the resignation of the Superior General of her office is necessary (article 11 (10)); that no one under the age of fifteen or over the age of twenty-five can be admitted a member of the society "except by order of the Bishop of Kingston" (article 3 (2)); and that neither a professed novice nor a sister of the community shall dispose of her estate without his permission (article 3 (13)).

It is clear, I think, that the Bishop of Kingston, except as to these matters, has no legal right to interfere in the management of the affairs of society. Article 4 (1) of the constitution provides that the society is to be governed by a Superior General assisted by a council of three or four members, and I find no warrant for subjecting the members of this Ontario corporation to the rules of the canon law of the Church of Rome or to the authority of the Bishop of Kingston, except in so far as authority is conferred upon him by the constitution itself.

The constitution makes no provision for the disciplining of a member or her expulsion from the society; and, if any such power exists, it must be found in the ordinary law of the land, and not in the canon law of the Church of Rome.

The rights which the members of the society possess are conferred upon them by provincial legislation, and those rights they are entitled to enjoy, and they may not be taken away by the application of the canon law or by any ecclesiastical authority of the Church of Rome.

The question as to the liability of the society for the acts of which the respondent complains is one of some difficulty. It was contended by counsel for the society that those acts were *ultra*

App. Div.
1918

BASIL
v.

SPRATT.

Meredith, C.J.O.

vires the corporation, that it had no power to remove the respondent from the house in which she was living, and still less to take her by force from it, in order to remove her to Montreal.

Although the English cases do not go so far, I should be prepared to adopt the rule established in the United States, that "if a corporation or its managing body *bonâ fide* believing that a particular transaction is within its powers direct an act which turns out to be *ultra vires*, still the corporation is liable to any person thereby damnified." Brice on *Ultra Vires*, 3rd ed., p. 439.

The difficulty in the way of the respondent appealing to this rule is that her case is that the governing body of the society, assuming it to have authorised what the appellant Regis did, and the appellant Regis were not acting *bonâ fide* within the meaning of the rule, but their action was taken, as the respondent contends, in order to gratify their own feelings and in pursuance of a conspiracy entered into by them to force her to leave the society; and for such acts I think that it is clear that the corporation is not liable, even if what they did had been apparently done in the course of and about their duties. There is the further difficulty that it would appear that the act done was clearly one that the society had no authority to do, and there is for that reason no ground for applying the rule which has been suggested. There is no evidence—at least direct evidence—of any express authority given by the society to the appellant Regis to do that which she did. A resolution adopted at a meeting of the council held on the 6th July, 1916, was relied on by counsel for the respondent.

The resolution is as follows:—

"The matter of Sister Basil's vicious conduct was discussed, also the advisability of removing her from St. Mary's-on-the-Lake to the Sisters' Hospital, Montreal. Her ill-treatment of the Sisters, disrespect of authority and for the constitution in the past, convinced the council that this step was necessary."

This resolution, in my opinion, affords no ground for holding that it conferred or assumed to confer upon the appellant Regis authority to remove the respondent by force from the house of the society in which she was living to Montreal, or to commit the acts of violence of which she was guilty. Fairly read, it means only that the council was of opinion that the removal of the respondent to Montreal was necessary, and, if it authorised anything to be done, it was to be done, not by force, but by lawful means.

Assuming, contrary to my view as to what the law is, that the society would be liable if it had expressly authorised what was done to be done, what I have said, if I am right, shews that no express authority was given, and it is clear that the law will not imply against the society that it gave authority to its officers to do that which itself had no right to do. See *Ormiston v. Great Western R.W. Co.*, [1917] 1 K.B. 598, 601, 602.

Upon the whole my conclusion is that the case as against the society failed and that as to it the action should have been dismissed.

I come now to the question whether there was evidence for the jury to fix the appellants Spratt and Phelan with responsibility for the wrongful acts of the appellant Regis. It was argued by counsel for these appellants that there was no evidence for the jury against them—nothing to shew that either of them was a party to the wrongful acts of the appellant Regis, but I am not of that opinion.

There was evidence which, if believed, warranted the jury in coming to the conclusion that both of these appellants were active participants in the wrongful act of the appellant Regis in assaulting the respondent with a view to taking her against her will to Montreal, an object which would probably have been accomplished but for the intervention of Father Mea.

The Archbishop was not called as a witness, but a part of his examination for discovery was read. It appears from it that Dr. Gibson had an interview with him with reference to the mental condition of the respondent: and it is evident that the discussion was with regard to the preliminary steps to be taken to warrant the committal of the respondent to an insane asylum. It was shewn that the Archbishop, after Father Mea had prevented the forcible removal of the respondent to Montreal, reprimanded him for having interfered with "my" (the Archbishop's) "administration," and the jury may well have taken this to mean that the act that was being done was being done by the Archbishop's authority. It was also shewn that in a discussion between the Archbishop and Father Mea as to some post-cards that had been sent, as the Archbishop insisted, by the respondent, the Archbishop said that the person who sent them was insane, and directed Father Mea to tell the respondent that she would find herself in a lunatic asylum.

App. Div.
1918

BASIL
v.
SPRATT.

Meredith, C.J.O.

App. Div.
1918

BASIL
v.

SPRATT.

Meredith, C.J.O.

It was also shewn that the respondent had sent to Rome a complaint which reflected upon the conduct of the Archbishop when he was a parish priest. We have then the view entertained by the Archbishop that the respondent was a proper subject for internment in a lunatic asylum, followed by a discussion with Dr. Gibson as to preliminary steps to be taken to that end, and that followed very soon by the assault on the respondent with the view of taking her against her will to Montreal, and the circumstance that, in the view of the parties to that act, when Father Mea intervened with a view to its prevention, the person to be communicated with was the Archbishop.

I am of opinion that in this there was evidence for the jury of the Archbishop's active participation in the wrongful acts of which the respondent complains.

There was also, in my opinion, evidence against the appellant Phelan sufficient to warrant the case as to him being left to the jury. He knew that it was contemplated to remove the respondent to Montreal and to do so against her will. He knew, according to his own admission, that she was not insane, and he it was who arranged with the Chief of Police of Kingston to provide a member of his force to take the respondent to Montreal, and there was evidence that he informed the police authorities that he would accompany the party to Montreal.

It was further contended by counsel for the appellants that evidence was improperly admitted of the acts committed after the assault upon the respondent.

This objection, though not specifically mentioned in the notice of appeal, is probably covered by clause (d) of the fifth ground stated in the notice.

The evidence was, I think, relevant for two reasons. In the first place, the respondent was entitled to shew what happened, after, on the advice of Father Mea, she remained in a house of the society after the assault, instead of, as she had purposed to do, going to the house of a friend in Kingston. Without explanation, it might have been urged against her that no great harm had been done to her by the assault, and her answer to that was that she was desirous of avoiding the scandal that would have arisen if she had left, and was willing to remain in a house of a society if her treatment in it was such that she could live there in peace and in the enjoyment of her rights as a member of the society.

The other ground upon which the evidence was, in my opinion, admissible, is that the respondent was entitled to shew, if she could, that the assault was but one act in carrying out a scheme designed to deprive her of her status and rights as a member of the society, and to establish malice on the part of the appellants, and to meet the contention that what was done was done from the best of motives, viz., the respondent's own good, by having her properly treated in an institution in which the mentally afflicted were cared for.

It was also argued that the ruling of the trial Judge as to the admission in evidence of the examination for discovery of the appellant Spratt was erroneous; that the whole of the examination, so far as it related to a conversation the appellant Spratt had had with Dr. Gibson, parts of which had been read, should have been read: that was the contention of counsel at the trial, but it was not well-founded. The admission of an examination for discovery is regulated by Rule 330, which provides that "any party may, at the trial of an action or issue, use in evidence any part of the examination of the opposite party; but the Judge may look at the whole of the examination, and if he is of opinion that any other part of it is so connected with the part to be so used that the last mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence."

The practice under this Rule is that when a part of the examination is being read, if counsel for the opposite party thinks that the case is one in which the provisions of the Rule should be applied, he points out to the presiding Judge the other parts which he contends should be read. The learned trial Judge more than once expressed his willingness to consider whether any other part of the examination than that which was being read should be read, but counsel for the appellants made no request that that should be done, and did not suggest what, if any, questions and answers, according to the provisions of the Rule, should be read, but apparently was content to rely upon his contention that the whole examination, so far as it related to the conversation with Dr. Gibson, should be read.

There remains to be considered the question as to the damages. They are, no doubt, large; but, if the jury, as they must have done, agreed with the contention of the respondent that the parties were

App. Div.
1918

BASIL
v.
SPRATT.

Meredith, C.J.O.

App. D v.
1918

BASIL
v. 

SPRATT.

Meredith, C.J.O.

not acting in good faith or under a belief that they were doing what they had a right to do, but were acting with the object which she attributed to them, not so large as to warrant our interfering with the jury's assessment. The case was one which, in that view of the appellants' conduct, warranted the jury in awarding punitive damages, and what those damages should be was a matter as to which, if the jury acted honestly and with a full appreciation of the facts, was a matter entirely for them, and to set aside their award would be, in the circumstances of this case, to usurp the functions of the jury and to substitute for their judgment the judgment of the Court in a matter as to which, subject to certain well established limitations, the jury are supreme.

It is to be noticed also that the jury was a special jury selected by the parties, though at whose instance it was struck does not appear.

No point was made by counsel for the appellants of the fact that the damages were separately assessed, and it is not necessary for the determination of this case, therefore, to decide whether, if objection had been taken on that ground, the objection would have prevailed. As at present advised, I am of opinion that it would not, and that we should follow what was done by this Court in *McLean v. Wokes*, 7 O.W.N. 490, notwithstanding the dictum of Lord Atkinson in *London Association for Protection of Trade v. Greenlands Limited*, [1916] 2 A.C. 15, at pp. 32, 33, to the effect that "a jury has no power, authority, or jurisdiction whatever to apportion between joint wrongdoers . . . the damages which they found the plaintiffs had sustained," and that "this is a matter of want of jurisdiction which no consent can cure."

I respectively dissent from this expression of opinion. The rules to which the learned Law Lord refers depended upon the technicalities of the common law, and ought not to obtain under the more elastic system which now prevails, and I see no reason why, if all parties—plaintiff and defendants—consent to that being done, the jury may not assess the damages separately against the several defendants as they may deem just.

The result then is that, in my opinion, the appeal of the appellants the Episcopal Corporation of the Diocese of Kingston and the Sisters of Charity of the House of Providence should be allowed without costs, and the action as against them be dismissed without

costs, and that the appeals of the other appellants, Spratt, Regis, and Phelan, should be dismissed with costs.

MACLAREN, MAGEE, AND HODGINS, J.J.A., agreed with
MEREDITH, C.J.O.

App. Div.
1918

BASIL
v.

SPRATT.

Meredith, C.J.O.

FERGUSON, J.A.:—I have had the advantage of perusing the opinion of my Lord the Chief Justice, but am unable to agree in his conclusions that there is not evidence on which the jury might find that the defendants the Sisters of Charity had authorised the removal of the plaintiff from St. Mary's Orphanage by force, or that the defendant corporations were both without corporate capacity to authorise such a removal.

The defendants the Sisters of Charity were incorporated under the Benevolent Societies Act (37 Vict. (Ont.) ch. 34), and by that Act empowered to hold and possess lands for the purpose of establishing and maintaining thereon homes for their members and charitable institutions.

It is provided by the Act (sec. 4) that a society incorporated under it may appoint officers for conducting and managing its affairs, and for maintaining discipline; and may also from time to time make by-laws, rules or regulations for the government and conduct of the society; and may alter and rescind such by-laws, rules or regulations.

On the 6th July, 1916, and while the defendant society was in possession and occupation of the premises known as St. Mary's Orphanage, the society, at a meeting of the officers appointed to manage its affairs, resolved:—

"The matter of Sister Basil's vicious conduct was discussed, also the advisability of removing her from St. Mary's-on-the-Lake to the Sisters' Hospital, Montreal. Her ill-treatment of the Sisters, disrespect of authority and for the constitution in the past, convinced the council that this step was necessary."

When the resolution was passed, the plaintiff, as a member of the society, was residing at St. Mary's Orphanage, and it was in removing her from the Orphanage that force was used, and the assault complained of committed, but it is urged that, as the resolution does not say how the removal was to be made, authority to use force cannot be implied, and consequently there is not suf-

App. Div.
1918

BASIL
v.

SPRATT.

Ferguson, J.A.

ficient evidence to justify the jury in holding that the acts complained of were in law the acts of the society. True, nothing is said in the resolution as to how the removal thereby directed was to be effected; and, in the absence of any evidence to the contrary, the law would presume that the removal was intended to be effected in a lawful manner, but at the trial much evidence was placed before the jury going to shew that, when the resolution was passed, it was by the governing council intended that the plaintiff should be removed by force, and without recourse to due process of law. On its face the resolution authorised not only a removal from St. Mary's, which might have been lawful if carried out according to law, but also the further removal to a Montreal insane asylum of a person admittedly not insane. It must be admitted that a part of this resolution could not have been intended to have been carried into effect by due process of law, and it seems to me that such a provision in the resolution and the other evidence of the circumstances leading up to and surrounding the making of the resolution, coupled with the subsequent acts of the members of the council who took part in the removal, afforded sufficient evidence to justify a finding that the society intended to and did authorise the removal of the plaintiff from St. Mary's Orphanage against her will and if necessary by force.

It is not without significance that the assault was carried out under the direction and supervision of the Superior, i.e., the general manager of the society, and it seems to me that this is a material fact distinguishing this from such cases as *Ormiston v. Great Western R.W. Co.*, [1917] 1 K.B. 598, and *Coll v. Toronto R.W. Co.* (1898), 25 A.R. 55, where the Court was asked to imply that a subordinate servant had authority from the corporation to do something beyond the scope of his employment.

Whether the defendant Regis acted for the corporation, or for herself alone, is not, I think, a question of law, but was a question of fact for the jury.

But it is urged that, even if it be found that the removal by force was intended, such a resolution would direct something to be done which it was beyond the corporate capacity of the society to authorise, and that it was impossible for the members of the society, by any resolution or other acts of theirs, to confer upon the society power to approve or direct an *ultra vires*

act. I cannot follow the reasoning for the conclusion that it was beyond the corporate capacity of the defendant society to authorise the removal of the plaintiff from St. Mary's. I have already pointed out that the defendant society was expressly empowered to own and possess lands and premises, and thereon to establish, maintain, and manage houses for its members, also charitable institutions, and it seems to me that corporate capacity to direct or authorise the removal of any other person from its premises is a necessary incident to the expressly conferred powers of ownership, possession, and management. See *Palmer's Company Precedents*, 7th ed., vol. 1, p. 278.

The forcible removal of the plaintiff from the defendant society's premises was, in the circumstances of this case, contrary to the general law of the land and illegal, but I cannot see that it was not under any circumstances possible for the defendant society to have directed and authorised the removal of the plaintiff from its premises by force; and, if that be true, the fact that its officers or agents effected the removal in an illegal manner does not render the act done or authorised to be done in an illegal manner, or even for an illegal purpose, an *ultra vires* act. It is on this principle, I think, that corporations have been held liable for such torts as libel, malicious prosecution, and assault. See the cases collected in the recent case of *Pratt v. British Medical Association* (1918), 35 Times L.R. 14, 23; also in *Palmer's Company Law*, 10th ed., pp. 73 and 75.

I do not, however, base my conclusions as to the corporate capacity of the Sisters of Charity on the Benevolent Societies Act alone—for, in my opinion, the corporate capacity of that society, as well as the corporate capacity of the defendant the Roman Catholic Episcopal Corporation of the Diocese of Kingston has, by recent legislation, been materially altered and enlarged.

In the judgment pronounced by the Privy Council in *Bonanza Creek Gold Mining Co. Limited v. The King*, [1916] 1 A.C. 566, it is stated, at pp. 584 and 585:—

“The words ‘legislation in relation to the incorporation of companies with provincial objects’” (British North America Act, sec. 92) “do not preclude the Province (Ontario) from keeping alive the power of the Executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a

App. Div.
1918

BASIL

v.

SPRATT.

Ferguson, J.A.

App. Div.
1918

BASIL

v.

SPRATT.

Ferguson, J.A.

natural person. Nor do they appear to preclude the Province from legislating so as to create, by or by virtue of a statute, a corporation with this general capacity. . . . ” And at pp. 583 and 584: “In the case of a company created by charter the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter.”

Following the *Bonanza Creek* judgment, the Legislature of Ontario, in the year 1916, by 6 Geo. V. ch. 35, sec. 6, added sec. 210 to the Ontario Companies Act, R.S.O. 1914, ch. 178, as follows:—

“210. Every corporation or company heretofore or hereafter created, . . .

“(b) By or under any special or general Act of the Parliament of the late Province of Canada, which has its head office and carries on business in Ontario, and which was incorporated with objects or purposes to which the authority of this Legislature extends; . . .

“(e) By or under any general or special Act of this Legislature, “shall, unless otherwise expressly declared in the Act or instrument creating it, have, and be deemed from its creation to have had, the general capacity which the common law ordinarily attaches to corporations created by charter.”

Both the defendant corporations come within the purview of that Act of 1916, and it follows that they must, in the words of the statute, be deemed to have and to have had, from their incorporation, all the general capacity which the common law ordinarily attaches to corporations created by charter, except in so far as that capacity is limited by express provision of the Act or instrument creating them.

Neither corporation was created by an exercise of the prerogative rights of the Crown, and in that respect they both differ from the corporation whose charter was under consideration in the *Bonanza Creek* case, but that difference can only be material when considering the effect of express restrictions, if any, appearing in the instrument creating the corporations. The meaning of the words “the general capacity which the common law ordinarily attaches to corporations created by charter” was considered, and the authorities in respect thereof were collected and reviewed, by the learned Chief Justice of the Common Pleas

and myself, in our respective pronouncements in *Edwards v. Blackmore* (1918), 42 O.L.R. 105. We did not agree either as to the result of the authorities or as to the application of the Act, but in that case I expressed the opinion that the authorities collected determined that the common law attached to a corporation created by charter a general capacity analogous to that of a natural person, and I have not changed my opinion, nor have I changed my opinion as to the intent of the Act of 1916, preferring to arrive at the intent of the Legislature from the words of the Act, rather than by attempting to read into the Act words of limitation, for the purpose of arriving at a result which, though it appealed to my judgment as a desirable result, was not according to the intent expressed; in adopting that course I endeavoured to follow the rule laid down by the House of Lords in *Salomon v. Salomon & Co.*, [1897] A.C. 22, and stated by Lord Watson as follows (p. 38):—

“‘Intention of the Legislature’ is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication.”

I am therefore of opinion that both the defendants have under the Act of 1916 a corporate capacity analogous to that of natural persons, except in so far as expressly restricted. It is not claimed that there is any express restriction affecting the capacity of the society to commit the act complained of; but it is said that the provision of the Act incorporating the Roman Catholic Episcopal Corporation expressly prohibits the exercising of any spiritual jurisdiction or ecclesiastical rights; that, I think, may be conceded, for in my view the acts complained of were not acts of that nature, but acts interfering with the civil and contractual rights of this plaintiff. The Chief Justice has pointed to the evidence justifying, in his opinion, the jury in finding against the Bishop in his personal capacity. It is clear that he purported to act in his capacity of Bishop, but whether the acts were or were not done by him in his corporate capacity also was, I think, a question for the jury, on

App. Div.
1918

BASIL
v.

SPRATT.

Ferguson, J.A.

App. Div.
1918

BASIL
v.

SPRATT.

Ferguson, J.A.

which they have found, and I am not prepared to say that there is no evidence to support their finding. I agree that the canon law and the rules for the government of societies of the Church which were put in evidence cannot, unless adopted by the society under its power to make by-laws, rules, and regulations, affect the rights and status of this society or its members, and while the parties to the action seem to have considered themselves bound by these laws and rules of the Church, they cannot, in the absence of the corporate action I have indicated, be looked at to determine the right and status of the parties.

Mr. Tilley contended that the doctrine of *ultra vires* did not apply to a corporation sole, such as the Bishop, arguing that, while a corporation aggregate was an artificial being, invisible, intangible, and existing only in the contemplation of the law, a corporation sole was the existing natural being of the person endowed with the attributes of a corporation. In the view I have taken, it is not necessary to decide the question, but I doubt the correctness of Mr. Tilley's contention. Brice, in his work on *Ultra Vires*, 3rd ed., p. 11, says:—

“In all cases, and whatever its other incidents, a corporation is a legal entity, separate from and additional to the members composing it.”

Thompson on Corporations, 2nd ed., vol. 1, sec. 15, says:—

“A corporation sole . . . consists of a single individual, having an artificial or legal personality distinguished from his natural character,” in support of which definition he cites a number of authorities, including 1 Blackstone Comm. 477.

I would dismiss all the appeals with costs.

In the result, the appeals of the two defendant corporations were allowed (FERGUSON, J.A., dissenting), and the appeals of the defendants Spratt, Regis, and Phelan were dismissed.

[APPELLATE DIVISION.]

1918

Dec. 6.

PETERSON LAKE SILVER COBALT MINING CO. LIMITED v.
DOMINION REDUCTION CO. LIMITED.

*Land—Deposit on, of Tailings, by Neighbour, with Permission of Owner—
Property in Tailings—Evidence—License—Conduct of Parties.*

The judgment of MIDDLETON, J., 41 O.L.R. 182, was affirmed.

AN appeal by the defendant company from the judgment of MIDDLETON, J., 41 O.L.R. 182.

October 21. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

Wallace Nesbitt, K.C., and R. McKay, K.C., for the appellant company, argued that the real question was whether the appellant company intended to abandon its right to the tailings when the arrangement was made that they should be discharged into the lake. The onus of shewing that such an intention existed was upon the plaintiff company, and it had failed to meet the onus. Counsel referred to *McLeod v. Sault Ste. Marie Public School Board* (1916), 36 O.L.R. 415, 424, 29 D.L.R. 661; *Philpot v. Bath*, [1905] W.N. 114, 21 Times L.R. 634.

I. F. Hellmuth, K.C., and McGregor Young, K.C., for the plaintiff company, respondent, argued that, the respondent being in possession, the proverbial "nine points" of the law, the onus was on the appellant to shew that the intention of the parties was that the tailings should continue to be the appellant's property after they were deposited in the lake. Counsel referred to *Boileau v. Heath*, [1898] 2 Ch. 301, cited in the judgment of the learned trial Judge, and also to *Sydenham Quartz Gold Mining Co. v. Ah Cheong* (1897), 23 Vict. L.R. 441; *Grayson v. Delaney* (1891), 10 N.Z.L.R. 134; *Commonwealth v. Steimling* (1893), 156 Penn. St. 400.

Nesbitt, in reply.

December 6. The judgment of the Court was read by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment, dated the 29th November, 1917, which was directed to be entered by Middleton, J., after the trial before him, sitting without a jury at Toronto on the 11th day of October, 1917.

App. Div.
1918

PETERSON
LAKE
SILVER
COBALT
MINING
Co.
LIMITED

v.
DOMINION
REDUCTION
Co.
LIMITED.

—
Meredith, C.J.O.

The respondent is a mining company, and the appellant a mining and ore milling and reduction company. The respondent is the owner of the land covered by water known as Peterson Lake and of a strip of land "33 feet in perpendicular width adjacent to the water's edge of the 66 feet road allowance" reserved along the shores of the lake. The appellant is the owner of a mill for treating, milling, and reducing ore, situate on land adjoining the land of the respondent.

The property of the appellant had belonged to the Nova Scotia Cobalt Silver Mining Company, and had been acquired by D. M. Steindler from the assignee of that company, and Steindler had conveyed it to a company referred to in the statement of claim as the old Dominion Reduction Company, and it was acquired by the appellant from that company.

The reduction mill was a custom mill for the treating of the ore of its customers, erected by the Nova Scotia company in or about the year 1909, and in it was treated ore from the respondent's property and from other customers. The directors of the two companies were practically the same until the Nova Scotia company assigned.

Peterson Lake is a body of water having a considerable area, and in some places, according to my recollection of what was stated in the argument, a depth of about 30 feet.

The tailings from the reduction mill were discharged through a pipe into Peterson Lake. They consisted of a sludge composed of slime and the other residue and material which remained after the ore had been treated in the mill, and this sludge probably contained particles of silver which had then, owing probably in part to the then value of silver and the only known processes for extracting the ore from the rock, no commercial value.

No distinction was made between the tailings from the respondent's ore and the other ones, but all were discharged into the lake. Whether or not it will be possible to separate the tailings from the respondent's ore, from the other tailings, does not appear—though it was stated by counsel for the appellant at the trial that it could be done.

The contest between the parties is as to the ownership of the tailings from the mill which were discharged into the lake, the claim of the appellant being that they have always been and are

its property and that it is entitled to remove them, while the respondent claims that they belong to it.

The arrangement under which the tailings were discharged into the lake was a verbal one, made in 1909 or 1910. Permission was then given to the appellant to discharge them into the lake.

Nothing appears to have been said as to the ownership of the tailings, though an attempt was made at the trial to shew that the understanding of the parties was that they were to remain the property of the appellant.

The evidence as to the arrangement was that of Jacob D. Jacobs and David M. Steindler. Jacobs was secretary-treasurer of the Nova Scotia company, and was also interested as a shareholder in the Peterson Lake company. According to his testimony, there was a discussion between Edward Steindler, the president of the Peterson Lake company, Mr. Kirby, the manager of the appellant company, D. M. Steindler, and himself, at which those who represented the Nova Scotia company "asked permission to put their tailings in the lake," and that Mr. Edward Steindler "consented as president of the Peterson Lake," as he himself also did, and that nothing was then said or arranged as to the ownership of the tailings.

No minute appears to have been made in the books of either company of this arrangement, but the Nova Scotia company acted upon it, and, when the mill began to operate, commenced to discharge the tailings into the lake, and continued so to discharge them while the company continued to operate the mill.

David M. Steindler testified that when the Nova Scotia company was considering where its mill should be located, Edward Steindler gave permission to dump the company's tailings into the lake, and that nothing was then said as to the Nova Scotia company removing them. According to his testimony, that was first spoken of after Sir Mortimer Davis became associated with him in the appellant company. Steindler also spoke (p. 51 of the notes of evidence) of his company having the right to dump the tailings in the lake, and having to "stop dumping them after they gave us notice."

On the 26th October, 1914, a letter was written by Mr. Kirby to the respondent (p. 12), stating that the appellant company for some time past had been "discharging the residue from its mill

App. Div.
1918

PETERSON
LAKE
SILVER
COBALT
MINING
Co.
LIMITED
v.
DOMINION
REDUCTION
Co.
LIMITED.

Meredith, C.J.O.

App. Div.
1918

PETERSON
LAKE
SILVER
COBALT
MINING
Co.
LIMITED

v.
DOMINION
REDUCTION
Co.
LIMITED.

Meredith, C.J.O.

into what is known as the Nova Scotia arm of Peterson Lake, which property is owned by your company; that it has long been understood between us by past verbal agreement on the matter that your company had no objection to this company discharging its residue in this arm of Peterson Lake, the surface of your property as occupied by this residue not being of any use to you at this time, and no damage being done by our residues on the surface of the same;" also stating that his directors felt that their company should have some written confirmation of the agreement on its files to shew that it had not encroached on the respondent's property without permission, and asking for this permission in writing.

On the following day a resolution was passed at a meeting of the directors of the respondent company instructing the secretary to "advise Mr. Kirby that this company would allow the Dominion Reduction Company to discharge their residues into the Peterson Lake until advised to the contrary," and on the next day the terms of this resolution were communicated by the secretary to Mr. Kirby. In his letter the secretary did not follow the terms of the resolution, but said that the appellant company was to discontinue discharging residues into Peterson Lake on one month's notice from his company.

On the 2nd November, 1914, Mr. Kirby replied saying that his company would comply with the request to cease depositing the residue in the lake upon 30 days' notice from the respondent.

It is probable that what led to this correspondence and the action taken was the interviews which Mr. Eugene M. Steindler, the secretary of the appellant company, testified that he had had with Mr. Morrison, the secretary of the respondent company, and Sir Henry Pellatt, its president; and it is, I think, safer to treat what was done as carrying out the arrangement said to have been made than to rely upon Mr. Steindler's recollection as to what that arrangement was.

At a later period Sir Mortimer Davis, who had become interested in the appellant company, pressed David M. Steindler to get the terms of the arrangement entered in the minutes—i.e., of the respondent company. What that arrangement was Steindler stated as follows (p. 51):—

"I had taken Sir Henry Pellatt's word for it for two or three

years that we had a perfect right to dump these tailings in the lake and we should stop dumping them after a certain time after they gave us notice."

Mr. Steindler and Sir Mortimer Davis would seem to have been ignorant of the correspondence in 1914 and of the resolution of the 25th October, 1914, which did that which Sir Mortimer Davis thought should be done. On the 14th May, 1915, Kerr, Bull, Shaw, Montgomery, & Edge, who were then acting as solicitors for the appellant company, wrote to the respondent asking for a letter from it signifying its assent to the deposit of tailings from the appellant's mill in the bay of the lake immediately adjoining the works of the respondent, on the understanding that if these tailings should ever prove to be of any value, the respondent should be at liberty to remove them. They then went on to say: "We understand this matter has been discussed several times between Mr. Steindler, the president of the Dominion Reduction Company, and different officers of your company, and that your company is agreeable to extend this privilege to Mr. Steindler's company;" and they ask for a letter confirming the understanding.

That letter was replied to on the 2nd July, 1915, by the secretary of the respondent company, in a letter in which he stated that at a directors' meeting held on the 30th June, 1915, he was instructed to write the solicitors stating "that it would be satisfactory to the directors of the Peterson Lake company for the Dominion Reduction Company to deposit their tailings in the bay of Peterson Lake provided that the Peterson Lake company had the right to deflect the point of deposit should they so desire."

The resolution that had been passed was that the secretary should write to the solicitors stating that what they had proposed would be satisfactory if the respondent had the right to deflect the point of deposit of the tailings.

It was said by counsel for the respondent that the right thus stipulated for was an important one, as the removal of the tailings if deposited in some parts of the lake might injuriously affect the respondent's mining operations under the lake.

It is not disputed by the respondent that the appellant has the right to remove the tailings which were deposited in the lake after the making of this arrangement, and the trial Judge has held that the respondent has that right.

App. Div.
1918

PETERSON
LAKE
SILVER
COBALT
MINING
Co.
LIMITED

v.
DOMINION
REDUCTION
Co.
LIMITED.

Meredith, C.J.O.

App. Div.
1918

PETERSON
LAKE
SILVER
COBALT
MINING
Co.
LIMITED

v.
DOMINION
REDUCTION
Co.
LIMITED.

Meredith, C.J.O.

At a later period the appellant company came to the conclusion that it would be advisable to drain the lake in order to reclaim the tailings. This was in the early part of the year 1917, and it led to a proposition being made to the respondent looking to that end.

A meeting of the directors of the respondent company was held on the 15th February of that year, at which the company's consulting engineer and Mr. Eugene M. Steindler were present.

The minutes of this meeting record that the president stated that the meeting was called to consider an agreement with D. M. Steindler for draining the lake, a tentative form of which had been prepared; that Mr. Steindler was asked for some remarks, and that he stated that "it was their intention to drain a portion of the lake, putting a dam across the narrow part, and either draining all the water out of the lake or lowering the water sufficiently to recover their tailings which had been dumped into same . . . that they were just considering the proposition at the present time, and they would of course have to obtain permission from the Dominion (*sic*) Government both as to the draining and placing of the water, and this had not been done."

A resolution was then passed:—

"That the period of time that the agreement should run would be five years and if required by the Dominion Reduction Company a further extension of three years."

It is also recorded that the engineer could not see that "the draining of the lake could be a detriment to Peterson Lake, but that it might be a decided advantage, as in the draining of other lakes in Cobalt the shores of the lake had shewn veins that would not have otherwise been known to exist."

The tentative agreement contains a recital that the respondent company had been using and was desirous of having the appellant company continue its permission to use the shaft on that company's property, for the mining operations of the respondent company, and that the appellant company was desirous, "for the purpose of treating certain tailings deposited in Peterson Lake, to drain, either by pumping or by such other method as they may deem advisable, that portion of Peterson Lake coloured . . . on the plan attached hereto."

The agreement then grants a license to the respondent company to use the shaft on certain conditions, and grants to the

appellant company the right, so far as the title, interest, and right of the respondent company is concerned, to drain that portion of the lake coloured . . . on the plan, and for that purpose to build or construct dams in, under, or across the lake, and such other works as might be necessary for the purpose of the drainage, "and to pump, excavate, use, and deal with all tailings from ores deposited in or found upon the said area, it being agreed that said tailings are the property of the said Dominion Reduction Company;" and it is provided that the license to the respondent company may be revoked on 6 months' notice in writing being given, but nothing is said as to the revocation of the license to the appellant company.

This proposed arrangement fell through. Why it fell through was not explained. It was, however, stated by counsel for the appellant at the trial, and was apparently not disputed, that it fell through owing to a change in the directorate of the respondent company.

This agreement is relied on by the appellant as containing an admission that all the tailings belonged to the appellant. To give to it that effect would be, I think, unreasonable. It may well be that, as a term of the arrangement that was proposed to be entered into, the respondent was willing to give to the appellant a right which it did not then possess, especially as in the view of the respondent's engineer the draining of the lake would be of advantage to the respondent.

I concur in the view of the trial Judge that the question to be decided is, "whether, when the defendant" (the appellant company) "returned this ore, won from the earth and earthy in its nature, to the bosom of the earth, the right to regard it as chattel property was lost, and it became part of the land owned by the plaintiff" (41 O.L.R. at p. 186).

I also agree with the conclusion of the learned Judge and the reasoning upon which it is based, and have little to add to what he has said.

That there was no express agreement between the parties as to the reclaiming of the tailings is clear, and the question therefore is, what, in the circumstances of the case, is the proper inference to be drawn as to the intention of the parties?

That the appellant is not entitled to any of the tailings which

App. Div.
1918

PETERSON
LAKE
SILVER
COBALT
MINING
Co.
LIMITED

v.
DOMINION
REDUCTION
Co.
LIMITED.

Meredith, C.J.O.

App. Div.
1918

PETERSON
LAKE
SILVER
COBALT
MINING
Co.
LIMITED

v.

DOMINION
REDUCTION
Co.
LIMITED.

Meredith, C.J.O.

were discharged into the lake by the Nova Scotia company, is clear. No transfer of them was made by the company, and, if it was the owner of them, it still owns them.

With regard to some things the inference to be drawn would be clear. If they had been lumber or coal or ore of commercial value, the proper inference would be that they remained the property of the person who deposited them on the land of another; while, on the other hand, if they had been earth or débris which was discharged into a hole or depression on the land of another, the contrary inference would be drawn.

In my opinion, the tailings in question, when discharged into the lake, ceased to be the property of the appellant. I refer of course only to the tailings which were so discharged before the 3rd July, 1915, when the arrangement was made that the appellant should have the right to remove them.

The tailings were of no commercial value, and it was problematical whether they would ever have any such value.

It is quite consistent, I think, with the testimony of the appellant's witnesses that it was not in the contemplation of the parties, or either of them, that the tailings which were discharged into the lake should be reclaimed by the appellant, but that the true position was that the appellant was finally getting rid of them, though it was thought that in the future tailings might have some commercial value and was contemplated that when that time should arrive persons who had tailings produced in the course of their operations would dispose of them otherwise.

No witness ventured to say that it would be commercially practicable, even if at all practicable, to take the tailings from the lake without pumping out the waters of the lake or otherwise draining it. The lake was of considerable depth, and if, after dumping into it sufficient to cover the bottom of it to the depth of 8 or 10 feet, the tailings would be many feet below the surface of the lake, the difficulty that there would be of removing them is obvious. The tailings went into the lake in the form of sludge, consisting of water and particles of rock and earth, and much of this would probably spread for a considerable distance beyond the point at which it was discharged into the lake.

The arrangement that was proposed in 1917 affords reasonable ground for concluding that it was only by draining the lake that

it would be practicable to remove the tailings except those on, above, or very little below the surface of the lake—when I say practicable, I mean commercially practicable.

What was said by Steindler at the meeting of the 15th February, 1917, when the proposed arrangement was being considered, shews, I think, that his view was that it was essential in order to recover the tailings that all the water should be drained out of the lake or that the water in it should be lowered.

If, as the appellant contends, there was always a right to remove the tailings from the lake, it must follow that there was a reciprocal obligation upon it to remove them when required by the respondent to do so. The license that was given was determinable on notice by the respondent, and I cannot conceive that any one dreamed that, if it should be determined, when tailings that had been discharged into the lake lay at the bottom of it with many feet of water over them, the appellant or its predecessor in title should be bound to remove them.

It is important also to observe that it was not until the 14th May, 1915, that the appellant sought to obtain the right to remove the tailings from the lake, and that, when agreeing that the appellant should have that right, the respondent stipulated that it should have the right "to deflect the point of deposit."

The letter of the appellant's solicitors of the 14th May, 1915, appears to be inconsistent with the view that the appellant had or that it thought that it had the right to remove the tailings that were then in the lake. What is asked is the consent of the respondent to the tailings from the appellant's mill being discharged into the lake, on the understanding that if they should ever prove to be of any value the appellant should be at liberty to remove them. This obviously applied only to the future, and it is most significant that there is no suggestion that the privilege to remove should extend to the tailings then in the lake.

This letter affords, I think, ground for concluding that the appellant thought that it was necessary to provide for the right to remove, and that, unless that permission were given, the tailings when discharged into the lake would cease to belong to the appellant; and, if that be the case, it leads to the conclusion that its view was that the tailings which had been discharged into the lake without any such permission having been stipulated for

App. Div.
1918

PETERSON
LAKE
SILVER
COBALT
MINING
Co.
LIMITED

v.
DOMINION
REDUCTION
Co.
LIMITED.

Meredith, C.J.O.

App. Div.
1918

PETERSON
LAKE
SILVER
COBALT
MINING
Co.
LIMITED

v.
DOMINION
REDUCTION
Co.
LIMITED.

Meredith, C.J.O.

had ceased to be the property of the appellant. The fact that the permission applied for was in respect to future deposits, and was not asked for as to the tailings then in the lake, is, I think, cogent evidence that the view of the appellant then was that it did not own those tailings.

It is also a cogent circumstance making against the contention of the appellant that, when the assignee of the Nova Scotia company sold its property to David M. Steindler, the appellant's predecessor in title, the tailings then in the lake were not treated as an asset of the company or transferred to him, and that no suggestion appears to have been made by Steindler, who knew that the tailings were in the lake and the circumstances under which they had been discharged into it, that they belonged to the company, or any complaint because they were not being transferred to him.

I am of opinion that the judgment should be affirmed and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

1918

Dec. 6.

ROTH V. SOUTH EASTHOPE FARMERS MUTUAL FIRE
INSURANCE CO.

Insurance (Fire and Lightning)—Barn Struck by Lightning—Further Injury by Wind—Proximate Cause—Finding of Fact of Trial Judge—Appeal—Produce in Barn—Neglect to Put in Safe Place—Injury by Rain—Variation of Judgment of Trial Judge—Costs of Appeal.

The judgment of MIDDLETON, J., 41 O.L.R. 52, was, on appeal, affirmed as to damages for injury by lightning to the plaintiff's barn, but varied by reducing the amount allowed for produce in the barn "destroyed and damaged." The lightning was not the proximate cause of the loss of a small quantity of threshed grain, which was put in the barn and there injured by the rain, when it might and should have been put in a place of safety.

No costs of the appeal were allowed to either party.

AN appeal by the defendant company from the judgment of MIDDLETON, J., 41 O.L.R. 52.

October 22 and 23. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

I. F. Hellmuth, K.C., and *W. T. McMullen*, for the appellant company, argued that the learned trial Judge had misapprehended the principle involved in *Reischer v. Borwick*, [1894] 2 Q.B. 548. Under his findings of fact the onus should have been cast upon the plaintiff to shew that the damage was caused by the lightning: *Stanley v. Western Insurance Co.* (1868), L.R. 3 Ex. 71, *per Martin*, B., at p. 75. They also referred to *Becker Gray and Co. v. London Assurance Corporation*, [1918] A.C. 101; *Leyland Shipping Co. v. Norwich Union Fire Insurance Society*, [1918] A.C. 350, *per Lord Dunedin* at pp. 362, 363; *Lobitos Oil Fields Limited v. Admiralty Commissioners* (1918), 34 Times L.R. 466. As regards the contents of the barn, the plaintiff had omitted taking the reasonable precautions which he was bound to take, and the appellant company should not be made liable for the loss.

Glyn Osler, for the respondent, the plaintiff, argued that, reading the judgment of the trial Judge as a whole, it was evident that he held that the damage caused by the wind was *primâ facie* the effect of the lightning, which was the proximate cause. The appellant company had failed to meet the onus which was properly cast upon it. He referred to *Wilson Sons & Co. v. Owners of the Cargo per the "Xantho"* (1887), 12 App. Cas. 503; *Isitt v. Railway Passengers Assurance Co.* (1889), 22 Q.B.D. 504. As to the alleged lack of proper precaution on the part of the respondent in covering the grain, he did the best he could in the circumstances and exercised his best judgment, which should not be scrutinised too narrowly.

Hellmuth, in reply, referred to *Birch v. Stephenson* (1915), 33 O.L.R. 427, 22 D.L.R. 404.

December 6. The judgment of the Court was read by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment of Middleton, J., dated the 22nd November, 1917, which he directed to be entered after the trial before him sitting without a jury at Stratford on the 13th day of that month.

The action is brought on a policy of insurance issued by the appellant on the 10th February, 1913, by which the appellant insured the respondent against loss or damage by fire or lightning to the amount of \$4,000 as follows: \$1,200 on his brick dwelling, \$300 on its ordinary contents, \$1,600 on his bank-barn, and \$900

App. Div.
1918
—
ROTH
v.
SOUTH
EASTHOPE
FARMERS
MUTUAL
FIRE &
INSURANCE
Co.

App. Div.
1918

ROTH
v.

SOUTH
EASTHOPE
FARMERS
MUTUAL
FIRE
INSURANCE
Co.

Meredith, C.J.O.

on his farm-stock, produce, and farm-implements, and the appellant agreed to make good to the respondent all such immediate loss or damage, not exceeding those amounts, as should happen by fire or lightning during the term of the policy.

The respondent's case is that the barn was struck by lightning, "by reason and in consequence of which" it was "destroyed and damaged" to the extent of \$1,689, and the produce in it was "destroyed and damaged" to the extent of \$230.

The appellant's contention is that the barn was not struck by lightning, but that it was damaged by a violent windstorm, and as to the claim for damage to the produce that, even if the injury to the barn was caused by lightning, the damage was not the result of it, but was occasioned by the fault of the respondent and his failure "to use all ordinary means and precautions to save and preserve the property . . . insured at and after the fire," which by the policy it was made a condition that he should do.

The evidence established to the satisfaction of the trial Judge that the barn was struck by lightning and was thereby damaged. He accepted the testimony of the respondent's wife, who was an eye-witness to what happened and told what she saw. According to her account the lightning struck the barn, tore out the north gable and upwards of 20 feet of the roof, and a violent wind followed in 5 or 10 minutes, which tore off the remainder of the roof and took out the sides of the building, leaving the south gable standing.

The finding of the trial Judge was "that the injury caused by the lightning was . . . throughout, an operating and continuing cause, and a proximate cause within the meaning of the rule," that is, the rule which he deduced from the cases to which he refers.

In an earlier part of his reasons for judgment, the learned trial Judge said: "Whether the wind would have damaged the barn if it had not previously been opened by the lightning, no one can say." This, it is contended, is inconsistent with his finding to which I have referred, and is, if a correct conclusion, fatal to the claim of the respondent for the damage which was caused by the wind.

I do not see the suggested inconsistency. It may well be that it is impossible to say whether, if the barn had been uninjured,

it would have been blown down by the wind, and at the same time it may be a reasonable inference from the facts proved that the lightning was the proximate cause of the damage which was done by the wind.

The north gable had been torn out and part of the roof carried away, and the building had been thereby weakened. If the wind came from a westerly direction, as it doubtless did, the sides of the building which were blown down were more susceptible to its action owing to the weakening of the structure by the damage that it had received, and the finding of the learned trial Judge that lightning was the proximate cause of the injury which the wind did is, in my opinion, a reasonable inference from the facts proved.

I would affirm the judgment as to the damages for the injury to the barn.

The learned Judge does not deal with the argument as to the claim for the damage done to the grain and hay, the injury to which was caused by rain which followed the injury to the barn. The grain, which consisted of wheat, barley, and oats, was threshed about a week after, and the threshed grain was put in the granary, and, as I understand the evidence, was while there injured by the rain. It cannot, I think, be said that the lightning was the proximate cause of this loss. The grain might and should have been put in a place of safety. The quantity of it was comparatively small, 75 bushels of wheat, 80 bushels of barley, and 150 bushels of oats; and, as the respondent chose to put it where it was exposed to the rain, he must bear the loss. The amount allowed on this head of the respondent's claim was \$100, and I would vary the judgment by reducing the damages awarded by that sum.

There should be no costs of the appeal to either party.

Judgment below varied.

App. Div.
1918

ROTH

v.

SOUTH
EASTHOPE
FARMERS
MUTUAL
FIRE
INSURANCE
Co.

Meredith, C.J.O.

1918

Dec. 6.

[APPELLATE DIVISION.]

McGLYNN v. HASTIE.

Bills of Exchange—Effect of Acceptance by Seller from Buyer of Cheque of Third Person in Exchange for Goods—Barter of Cheque with all Risks—Dishonour of Cheque—Absence of Laches—Non-revival of Debt—Failure of Action against Buyer for Price of Goods.

Where an unendorsed bill is given not in payment of a pre-existing debt, but by way of exchange for goods, the transaction is a sale of the bill by the party transferring it, and a purchase of the instrument, with all risks, by the transferee.

Fydel v. Clark (1796), 1 Esp. 447, and *Camidge v. Allenby* (1827), 6 B. & C. 373, followed.

The plaintiff sold hogs to the defendant and accepted in payment the cheque of M., a third person, for whom the defendant said he was buying. The cheque was a blank one, signed by M.; the amount was filled in by the defendant when the bargain was struck. The bargain was made, the hogs delivered, and the cheque handed over at one and the same time; the plaintiff knew that the cheque was M.'s, and said nothing about it. The cheque was dishonoured, and the plaintiff sued the defendant for the price of the hogs. No question of laches arose:—

Held (MAGEE and HODGINS, JJ.A., dissenting), that the transaction amounted to a barter of the cheque, with all its risks; the debt did not revive upon dishonour of the cheque; and the action failed.

Per HODGINS, J.A.:—Where a negotiable instrument, including a cheque either of the debtor or a third person, is taken for an antecedent debt of the debtor, it is, unless special circumstances intervene, only conditional payment, and, unless the receiver is guilty of laches, he can, upon non-payment of the security, look to his original purchaser. There was an antecedent debt; and there was not in the evidence any clear indication that the cheque of M., when it became a completed instrument, was, without a word being said, purchased *eo instanti* by the plaintiff.

Review of the authorities.

APPEAL by the defendant from the judgment of the Judge of the County Court of the County of Huron, in favour of the plaintiff, in an action for \$200.10, the price of 6 hogs sold and delivered to the defendant and the expenses of protest of a cheque given in payment for the hogs, which cheque was dishonoured.

The defendant alleged that in buying the hogs he was acting as agent for one Munro, and so informed the plaintiff, and that the plaintiff on the morning of the 18th October, 1917, accepted Munro's cheque, which was the dishonoured cheque, as payment for the hogs.

October 25. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

Charles Garrow, for the appellant, argued that Munro was the real purchaser of the hogs, to the knowledge of the plaintiff, and

that, even if the appellant was the original purchaser, what happened on the morning of the 18th October amounted to a novation by which Munro became the purchaser, and his cheque was accepted as payment by the plaintiff. Even if the findings of fact of the trial Judge are accepted, the defendant is absolved from liability, as the transaction was primarily a sale of the cheque, there having been no pre-existing debt: Byles on Bills, 17th ed., pp. 181, 182, and the cases there cited of *Evans v. Whyte* (1829), 5 Bing. 485, 488; *Camidge v. Allenby* (1827), 6 B. & C. 373, 385; Roscoe's *Nisi Prius Evidence*, 18th ed., p. 699, where the *Camidge* case is cited, and also *Fenn v. Harrison* (1790), 3 T.R. 757. The onus was on the plaintiff to shew that Munro, whose cheque was accepted, was not the real purchaser; and he had not done so.

William Proudfoot, K.C., for the plaintiff, the respondent, argued that the question at issue was purely one of fact, and having been found in favour of the plaintiff by the trial Judge, his finding should not be disturbed. Counsel referred to Bowstead on Agency, 5th ed., p. 407, art. 120, and cases there cited.

Garrow, in reply, argued that the appellant should succeed even if the findings of the trial Judge were accepted.

December 6. MACLAREN, J.A.:—The defendant appeals from a judgment of the County Court Judge of Huron condemning him to pay the plaintiff \$200.10 for 6 hogs, and the cost of protest of the cheque given in payment for them. The defendant claimed that he had bought the hogs as the agent of one Munro, and had so informed the plaintiff, and that the plaintiff accepted Munro's cheque in payment.

The evidence is that the defendant called at the plaintiff's house on the evening of the 17th October, 1917, and asked him if he had any hogs for sale. The plaintiff says that he answered that he "had 4 about ready." The defendant says that he told the plaintiff he was buying for a dealer named Munro, who was giving 17½ cents a pound, and was going to ship from the Gorrie station the following morning, and had given him blank cheques to fill up. The plaintiff says that Munro's name was not mentioned that evening. The defendant asked the plaintiff if he would bring his hogs to the station in the morning. The plaintiff says that his reply was,

App. Div.
1918

McGLYNN
v.
HASTIE.

App. Div.
1918

McGLYNN
v.

HASTIE.

Maclaren, J.A.

"If it is a fine morning I will fetch them down" (it was raining that evening). In the morning the plaintiff brought to the station 6 hogs, which were weighed, and a slip was given him by the weigher, which he presented to the defendant, who filled up a blank cheque of Munro's drawn on the Dominion Bank at Wingham for \$198.50, and gave it to him.

The plaintiff admitted that he had, a few weeks previously, sold another lot of hogs to one Scott, another agent of Munro's, and received in payment a cheque of Munro's filled up by Scott, which was honoured.

A brother of the defendant swore that he was present when the plaintiff called to see his brother about the cheque, and that the plaintiff then admitted that the defendant had told him on the evening of the 17th that he was buying for Munro and not for himself.

The trial Judge, however, preferred the testimony of the plaintiff on this point, and I accept his finding.

He has further held that the sale was made on the evening of the 17th October. In this I am of opinion that he is clearly in error. The plaintiff's evidence is that he said he had about 4 hogs ready, and if the next morning was fine he would take them to the station. He himself says that he was under no obligation to take them, and he took 6, instead of the 4 he had spoken of the previous evening, and they had to be weighed and delivered before the sale was complete. It is worthy of note that the solicitor of the plaintiff, in endorsing the particulars of his claim on the back of the writ of summons, gives the proper date of the sale, viz., the 18th October. The materiality of this question of date will presently appear.

The cheque was presented at the bank on the 19th October, and noted for non-payment, and protested on the 20th. The defendant was advised of this within a reasonable time, so that no question of laches arises.

While the plaintiff denied that the name of Munro was mentioned on the previous evening, he noticed, when the defendant gave him the cheque, that it was signed by Munro and not by the defendant, and he went away without saying anything about it. He, no doubt, was satisfied, as Munro's cheque which he had received from Scott a few weeks previously had been duly paid.

The authorities shew that where a bill, note, or cheque is taken

for or on account of a pre-existing debt, the presumption is that it is only conditional payment, and if it is dishonoured the debt revives; but, if it is given in exchange for goods or other securities sold at the time, the transaction amounts to a barter of the bill, with all its risks.

In *FydeU v. Clark* (1796), 1 Esp. 447, one of the earliest cases where this question arose, Lord Kenyon says (p. 448): "If, in the discount of the notes, he" (plaintiff) "took the bills and notes in question, he must be bound by it: the bankers parted with them, supposing them to be good; he took them under the same impression. Having taken them without endorsement, he has taken the risk on himself."

In *Camidge v. Allenby*, 6 B. & C. 373, at pp. 381, 382, Bayley, J., says:—

"If the notes had been given to the plaintiff at the time when the corn was sold, he could have had no remedy upon them against the defendant. The plaintiff might have insisted upon payment in money. But if he consented to receive the notes as money, they would have been taken by him at his peril."

The law on the point is, in my opinion, correctly summed up in Byles on Bills, 17th ed., p. 182, where it says that where an unendorsed bill is given "not in payment of a pre-existing debt, but by way of exchange for goods . . . such a transaction has been repeatedly held to be a sale of the bill by the party transferring it, and a purchase of the instrument, with all risks, by the transferee."

See also Roscoe's *Nisi Prius Evidence*, 18th ed., p. 699, where it says: "A distinction has been drawn between the cases in which it" (a bill) "has been given in exchange for goods or other securities, sold at the time, and those in which it has been given in payment of a pre-existing debt. The former transactions amount, it is said, to a barter of the bill, with all its risks."

In my opinion, the judgment appealed from should be reversed and the action dismissed.

MEREDITH, C.J.O., and FERGUSON, J.A., agreed with MACLAREN, J.A.

HODGINS, J.A. (dissenting):—The contest is whether the appellant bought the hogs as agent for one Munro, and whether the respondent accepted Munro's cheque as payment.

App. Div.
1918

McGLYNN
v.
HASTIE.

Maclaren, J.A.

App. Div.
1918

McGLYNN
v.

HASTIE.

Hodgins, J.A.

I have no doubt that there was no contract made on the evening of the 17th October, 1917. The appellant called on the respondent at his farm, and the evidence of both shews that, while the rate per pound was settled at $17\frac{1}{2}$ cents, neither the number of hogs nor their weight nor their certain delivery was agreed upon. The matter was left in this way: that the respondent had some hogs to sell, that about 4 were ready to go, and that if it was a fine morning he would bring them down to the station at Gorrie. There was no binding obligation to deliver entered into, and, if there had been, yet an act still required to be done in order to fix the price—i.e., weighing. This shews that no contract existed previous to weighing and delivery next morning: *Logan v. LeMesurier* (1847), 6 Moore P.C. 116.

In the morning, 6 hogs, not 4, were brought in, and the appellant was there to receive them. They were weighed by the station agent and put in the pens. The weight and price were written on the back of the weigh-slip, and this was handed to the appellant by the respondent.

Upon the weighing and delivery and the consequent ascertainment of the price, the bargain for 6 hogs was for the first time a completed agreement, and the consideration became at once payable.

The trial Judge has preferred the evidence of the respondent to that of the appellant upon the question of whether on the evening of the 17th October, 1917, the statement was made that Munro was purchasing the hogs. The respondent point blank denies that any reference to Munro was made that night or indeed that he knew him in the transaction till he saw the name on the cheque given in payment. The appellant, on the other hand, asserts that he told him that Munro was shipping at Gorrie in the morning at $17\frac{1}{2}$ cents and asked if he would like to fetch the hogs out, saying he had been over to Wingham and had got the blank cheques to pay the men in the morning.

There is nothing in the testimony that would suggest that the learned trial Judge is wrong in adopting the version which he prefers. It must therefore be taken that the sale was made by the respondent to the appellant not as agent but as principal. I am not at all sure, after perusing the evidence, that the appellant was not simply picking up hogs on his own account, having some agree-

ment with Munro to take them at a price sufficient to pay for the appellant's time and trouble. But the finding I refer to puts an end to any such question. It also renders unimportant the difference between the respondent and the appellant's brother as to the effect of a conversation between them relative to this point of disclosed agency.

Such being the case, then, upon the delivery into the pens, the price became payable by the appellant. Instead of paying cash, he filled up a blank cheque of Munro's, making it payable to the respondent, gave it to him, and he took it away with him. Nothing was said at the time by either party by way of comment or explanation.

On these facts, what is the effect of the giving and receiving of a cheque signed by Munro instead of one signed by the appellant?

If it had been the appellant's own cheque, it would be a conditional payment, and the right of action for the purchase-money would be suspended, but on the dishonour of the cheque would have revived: *Cohen v. Hale* (1878), 3 Q.B.D. 371.

The case of *Belshaw v. Bush* (1851), 11 C.B. 191, forms a good starting-point for ascertaining how far that principle applies where the cheque is that of a third person. There the plaintiff drew a bill upon a third party, William Bush, for part of the debt of the defendant. Maule, J., who delivered the judgment of the Court, said what follows, at pp. 206, 207:—

"If a bill given by the defendant himself on account of the debt operate as a conditional payment, and so be of the same force as an absolute payment by the defendant, if the condition by which it is to be defeated has not arisen, there seems no reason why a bill given by a stranger for and on account of the debt should not operate as a conditional payment by the stranger; and, if it have that operation, the plea in the present case will have the same effect as if it had alleged that the money was paid by William Bush for and on account of the debt. But, if a stranger give money in payment, absolute or conditional, of the debt of another, and the causes of action in respect of it, it must be a payment on behalf of that other, against whom alone the causes of action exist, and, if adopted by him, will operate as payment by himself."

In 1858 this decision was followed in *Bottomley v. Nuttall*, 5 C.B.N.S. 122. It was there decided that drawing a bill of

App. Div.
1918

McGLYNN

v.

HASTIE.

Hodgins, J.A.

App. Div.
1918

McGLYNN
v.

HASTIE.

Hodgins, J.A.

exchange on one partner did not shew an election to trust him and to release the firm—nor did the making out of invoices in his name.

Williams, J., said (p. 144):—

“If the creditor accepts a bill or note for and on account of the debt, that operates as a conditional payment . . . If the bill has been returned to the creditor unpaid, without any laches on his part, the condition which was to defeat the payment has happened, and consequently it is no payment.”

Crowder, J., agreed with Williams, J. Byles, J., said that taking a bill for and on account of the debt does not operate as an absolute discharge of the debt. It is at most a conditional payment.

In *Hopkins v. Ware* (1869), L.R. 4 Ex. 268, the plaintiff lent £250 to one Ware. After his death, the solicitor of the executor of Ware sent the plaintiff his own cheque for £258, the amount due. The solicitor's cheque was dishonoured, and the trial Judge found for the plaintiff. On appeal the Court were of opinion that the plaintiff, by laches, had lost the chance of payment and could not recover from the estate. Channell, B. (pp. 271, 272), says:—

“Certainly when the cheque was remitted it did not operate as payment; it only did so, if at all, on the duty to present in reasonable time being neglected.”

The case of *Currie v. Misa* (1875), L.R. 10 Ex. 153, *Misa v. Currie* (1876), 1 App. Cas. 554, is of importance here because the majority of the Court of Exchequer Chamber point out that the true reason, as given by the Court in *Belshaw v. Bush*, 11 C.B. 191, and upon which its judgment is founded, is that a negotiable security given on account of a pre-existing debt is a conditional payment of the debt, the condition being that the debt revives if the security is not realised (p. 163). They then go on to add (p. 164) that “the doctrine is as applicable to one species of negotiable security as to another; to a cheque payable on demand, as to a running bill or a promissory note payable to order or bearer, whether it be the note of a country bank which circulates as money, or the note of the debtor, or of any other person.”

The question involved in *Currie v. Misa* arose on the giving of a cheque, and the argument proceeded on the assumption that while, if a negotiable security payable at a future day had been given, the element of time during which suspension of the remedy would operate formed the consideration, the same result could not follow in case of a cheque which was payable on demand.

I find that in cases earlier than *Belshaw v. Bush* the giving of a negotiable instrument made or drawn by a third party has been considered as equivalent to the giving of such an instrument by the debtor.

The view held by Mr. Justice Maclaren in his work on Bills Notes and Cheques, 5th ed., p. 368, is shewn in the following passage where the learned author draws his conclusion from *Currie v. Misa* and *Maxwell v. Deare* (1853), 8 Moore P.C. 363:—

“A creditor is not bound to take a bill, note or cheque in payment of a debt; and if he does so it operates only as a conditional payment, unless he expressly agrees to take it in absolute payment, or unless there are special circumstances from which such an agreement may be implied.”

See also Falconbridge on Banking and Bills of Exchange, 2nd ed., pp. 569, 570, *et seq.*; Roscoe's Nisi Prius, 18th ed., p. 700; Byles, 17th ed., p. 183; Chalmers on Bills of Exchange, 7th ed., pp. 338, 242.

Belshaw v. Bush has been followed in *Keay v. Fenwick* (1876), 1 C.P.D. 745 (C.A.); *In re A Debtor*, [1908] 1 K.B. 344; *In re J. Defries & Sons Limited*, [1909] 2 Ch. 423.

It may be interesting to note that, earlier than 1851, the question had arisen in at least four cases where promissory notes or bills of exchange of a third person had been taken by the creditor. These are *Stedman v. Gooch* (1793), 1 Esp. 3; *Kearslake v. Morgan* (1794), 5 T.R. 513; *Camidge v. Allenby* (1827), 6 B. & C. 373; *Goodwin v. Coates* (1832), 1 Moo. & Rob. 221; and in each case the plaintiff had judgment.

These cases, as well as *Currie v. Misa*, are discussed by my brother Riddell in *Freeman v. Canadian Guardian Life Insurance Co.* (1908), 17 O.L.R. 296.

The only remaining question on this branch of the case is whether a cheque under our law stands in the same position as in the English cases. I think it is clear from our Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 53, and sec. 165, that a cheque, for the purposes of this case, must be treated as a negotiable instrument within the decisions which have been already cited.

Section 53, in providing that valuable consideration may be constituted by an antecedent debt or liability, says that such a

App. Div.
1918.

McGLYNN
v.
HASTIE.

Hodgins, J.A.

App. Div.
1918

McGLYNN
v.

HASTIE.

Hodgins, J.A.

debt or liability is so considered "whether the bill is payable on demand or at a future time."

By sec. 165, a cheque is a bill of exchange drawn on a bank payable on demand, and, except as otherwise provided in Part III. of the Bills of Exchange Act, the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque. The exceptions may be found in Maclaren on Bills Notes and Cheques, 5th ed., p. 425, and do not affect the question. See *McLean v. Clydesdale Banking Co.* (1883), 9 App. Cas. 95; *Trunkfield v. Proctor* (1901), 2 O.L.R. 326.

Looking at the facts of this case, I think the situation may be described in the words of Sir John Jervis in *Maxwell v. Deare*, 8 Moore P.C. 363, 377:—

"The object was to substitute a bill of exchange for a cash payment as a mode of payment, but only to be considered so if the bill was duly honoured at maturity."

The law applicable to the case is that where a negotiable instrument, including a cheque either of the debtor or a third party, is taken for an antecedent debt of the debtor, it is, unless special circumstances intervene, only conditional payment, and that, unless the receiver of it is guilty of laches, he can, upon non-payment of the security, look to his original purchaser.

What then is the evidence on the question of diligence or laches on the part of the plaintiff? The cheque in question is dated the 18th October, 1917, and is drawn on the Dominion Bank, Wingham. The respondent deposited it to his credit in the Bank of Hamilton in Wroxeter on the same day, and it reached the branch of that bank at Wingham on the 19th October. It was noted for non-payment also on the 19th and protested on the 20th October, 1917. The respondent learned of this on the 22nd, and at once called up the appellant's house. In his absence he left a message with the appellant's wife that Munro's cheque was protested, and was told by her to go and see Fells in Wingham. Fells was a partner of Munro. The respondent did not go, but he heard, shortly after, from the appellant by telephone and discussed the matter with him. The appellant promised to see Munro and communicate with the respondent, but did not do so, and the respondent then went to see him without any result. No laches is shewn, and the cheque is produced from the respondent's custody. The right of

the respondent to sue the appellant has not been lost, and he is entitled to recover the amount sued for.

The appeal should be dismissed.

Since writing the above, I have had the advantage of reading the judgment of my brother Maclaren. While unable to agree with its conclusions, yet, on account of his authority upon questions of this nature, I feel I must venture to set out my reasons notwithstanding the small amount at stake.

I cannot bring myself to regard the transaction as a barter, or as the purchase of a negotiable security. The cheque was, until the moment before it was handed over, an incomplete instrument: *Hogarth v. Latham & Co.* (1878), 3 Q.B.D. 643. The appellant was, therefore, not the holder of a security which he desired to sell, and it was not until after the delivery and weighing was complete, and the sale of the hogs made, that the cheque became a valuable security.

To decide that, without a word being said, the respondent at that moment of time bought the cheque as a bill of exchange, and lost his right to be paid for the hogs if Munro had not enough money in the bank, is to go much further than I think the real transaction warrants. It is a question of intention, and therefore of fact, as is pointed out in Chalmers, 7th ed., p. 342.

I think there was an antecedent debt; for, as Lord Campbell observes in *Timmings v. Gibbins* (1852), 18 Q.B. 722, 726: "In fact it is difficult to say that there can be any case in which the debt is not antecedent to the payment. Even where the money is paid over the counter at the time of the sale, there must be a moment of time during which the purchaser is indebted to the vendor."

Fyddell v. Clark, cited by my learned brother, relates to undorsed bills and notes given by a bank 2 years before to a customer for the proceeds of promissory notes for £8,000, and the action was by the customer's former partner, asserting liability in the bank to pay the value in cash of those securities, which proved worthless. It was properly held that the customer must have long since agreed to take the securities in the place of cash.

The case of *Camidge v. Allenby* was one of what were known as county bank notes. Its effect is set out in the following quotation from Halsbury's Laws of England, vol. 1, pp. 574, 575:—

App. Div.
1918

McGLYNN

v.

HASTIE.

Hodgins, J.A.

App. Div.
1918

McGLYNN
v.

HASTIE.

Hodgins, J.A.

"If a bank note be given in payment for value received at the time, the payment is complete, and in the event of dishonour of the note, no recourse can be had against the transferor either on the note or the consideration for it (*Camidge v. Allenby* (1827), 6 B. & C. 373). But a note given for a pre-existing debt has been held to be only payment conditional on its being paid when presented. A note, however, must be presented or circulated within a reasonable time, otherwise, in the event of the bank failing, the loss will fall on the transferee. And in the event of the bank failing, or the note being dishonoured, the transferee, in order to preserve his right as against the transferor, must give him notice and offer to return the note."

It is also treated in the same way by Roscoe and by Byles, in the last editions of their works, where the decision is limited to bills or notes *payable to bearer*. Bramwell, B., in *Guardians of Lichfield Union v. Greene* (1857), 1 H. & N. 884, deals with it as if confined to bank notes.

In Roscoe's *Nisi Prius*, 18th ed., p. 699, this statement is made:—

"If a bill or note payable to bearer be delivered without endorsement, a distinction has been drawn between the cases in which it has been given in exchange for goods or other securities, sold at the time, and those in which it has been given in payment of a pre-existing debt. The former transactions amount, it is said, to a barter of the bill, with all its risks. *Fenn v. Harrison*, 3 T.R. 757, 759; *Ex p. Shuttleworth* (1797), 3 Ves. 368; *Camidge v. Allenby*, 6 B. & C. 373, 381. But when the security is delivered in payment of a pre-existing debt, the delivery does not operate as payment, unless the transferee makes the security his own by laches."

Byles on Bills, 17th ed., p. 182, puts it thus:—

"If a bill or note, made or become payable to bearer, be delivered without endorsement, not in payment of a pre-existing debt, but by way of exchange for goods, for other bills or notes, or for money transferred to the party delivering the bill at the same time, such a transaction has been repeatedly held to be a sale of the bill by the party transferring it, and a purchase of the instrument, with all risks, by the transferee."

No doubt the statement by Bayley, J., if read as applying generally to all negotiable instruments, may bear the construction

given to it. If so treated it would be inconsistent with *Currie v. Misa*, ante. But such a wide interpretation was not necessary to the decision, and I do not think that all the learned Judge's remarks have been treated by the text-writers as authoritative, or as expressing the judgment of the Court.

Park, J., at about the same time, in *Evans v. Whyte* (1829), 5 Bing. 485, 488, said:—

"If a party sells goods, and takes for them a bill of exchange which is not honoured, he is remitted to his original consideration."

In Halsbury's Laws of England the sale or transfer of a bill is spoken of in vol. 2, pp. 521, 522, in this way:—

"A transferor by delivery is in effect the vendor of an instrument precisely as he might be the vendor of any other chattel. Beyond the actual points in regard to it which he warrants he is in no way responsible for the value of what he sells. If, therefore, its value diminishes or even vanishes altogether, e.g., through the bankruptcy of any of the parties to it, he is not bound to compensate the transferee for his consequent loss (*Fyde v. Clark* (1796), 1 Esp. 447, 448). Where, on the other hand, the instrument is transferred, not by way of sale, but in payment of a debt, the transferor is liable on the consideration unless the instrument was taken in absolute satisfaction of the debt. *Camidge v. Allenby* (1827), 6 B. & C. 373."

And in vol. 7, pp. 447, 448, the general rule is thus stated:—

"A creditor is not bound to accept payment of a debt otherwise than in current coin, or, in the case of a debt exceeding £5, in notes of the Bank of England; and if he takes a bill, note, or cheque in payment, he may either accept it in satisfaction of the debt, in which case he takes the risk of its being dishonoured, or may accept it as a conditional payment only, the effect of which is to suspend his remedies during the currency of the instrument.

"The presumption, in the absence of a clear indication of a contrary intention, is that payment by means of a bill, note, or cheque is a conditional payment only. If the security is paid when it becomes due, this is equivalent to payment of the original debt; and if it is paid in part, the original debt is discharged *pro tanto*. If the instrument is dishonoured, payment of the original debt may be enforced as if no security has been taken, unless the bill has been negotiated and is outstanding at the time of action brought in the

App. Div.
1918

McGLYNN
v.

HASTIE.

Hodgins, J.A.

App. Div.
1918

McGLYNN
v.

HASTIE.

Hodgins, J.A.

hands of a third party, in which case the creditor's remedy continues to be suspended."

I cannot find, in the evidence in this case, any clear indication that the cheque of Munro, when it became a completed instrument, was, without a word being said, purchased *eo instanti* by the respondent, and prefer to rest my conclusion upon the proposition as above laid down.

MAGEE, J.A., agreed with HODGINS, J.A.

Appeal allowed (MAGEE and HODGINS, JJ.A., dissenting).

1917

[APPELLATE DIVISION.]

Aug. 1.

UNION BANK OF CANADA v. MAKEPEACE.

Dec. 6.

1918

Guaranty—Account of Trading Company with Bank—Liability of Guarantor—Assignment by Company for Benefit of Creditors under Assignments and Preferences Act—Securities Held by Bank—Mortgage on Company's Land—Conveyance of Equity of Redemption from Assignee to Bank—Acceptance in Satisfaction of Bank's Claim—Release of Guarantor from Liability as Surety—Absence of Reservation of Bank's Rights against Surety—Interference with Surety's Rights—Merger—Intention—Account—Application of Payments.

The judgment of MIDDLETON, J. (1917), 40 O.L.R. 368, finding that the defendant had not been discharged from liability as surety for the indebtedness of a trading company to the plaintiff bank, was reversed upon appeal (HODGINS, J.A., dissenting).

Held, by MACLAREN and FERGUSON, JJ.A., that the conveyances made by the assignee (for the benefit of creditors under the Assignments and Preferences Act) of the company to the plaintiff bank were made and accepted in satisfaction of the bank's claim against the company, and that the defendant was thereby freed from liability.

Per MAGEE, J.A.:—There was not, in the agreement for the release of the equity of redemption in the land mortgaged to the bank, any reservation of the bank's rights against the surety; and, in giving up the bank's claim, the bank released any claim the surety might have, and so interfered with the surety's rights.

Per HODGINS, J.A.:—The conveyance of the equity of redemption had not the effect of merging the charge created by the mortgage and so extinguishing the debt. Merger depends upon the intention of the parties to the dealing which is said to produce it; there was no intention on the part of the bank or the assignee to merge the debt, and none was to be implied from the transaction. Merger would be clearly against the interests of both, and that was sufficient to rebut any presumption that it was intended. The release by the assignee did not preclude action on the covenant against the debtor, the company.

The defendant also appealed from an order made by SUTHERLAND, J., dismissing an appeal from the Master's report fixing the amount due by the defendant, upon the footing of her liability to the bank upon her guaranty, and dealing with a question as to the proper application of payments made by the debtors. This order was also reversed (HODGINS, J.A., dissenting), as a consequence of the holding that the defendant was not liable at all.

AN appeal by the defendant from the judgment of MIDDLETON, J., of the 9th October, 1917, upon the trial of an issue, finding that the appellant had not been discharged from liability as surety, but was liable to the plaintiff bank upon a guaranty; and an appeal, also by the defendant, from an order of SUTHERLAND, J., of the 1st August, 1917, dismissing an appeal from a report of the Master in Ordinary, dated the 5th March, 1917, whereby the amount due by the appellant was fixed at \$3,179.66.

1917-18
UNION BANK
OF
CANADA
v.
MAKEPEACE.

The reasons for the judgment of MIDDLETON, J., are reported, 40 O.L.R. 368, 38 D.L.R. 361.

The reasons for the order of SUTHERLAND, J., were as follows:—

August 1, 1917. SUTHERLAND, J.:—The Specialty Manufacturing Company was a customer of the plaintiff bank at Grimsby on and prior to the 2nd February, 1914, at which date the company was indebted to the bank in the sum of \$11,000 or thereabouts, represented or covered by the notes of the company or its customers for the most part, and by an actual overdraft of \$922.26.

On the 2nd February, 1914, the defendant, Sophronia J. Makepeace, signed the following guaranty:—

“To the Union Bank of Canada:—

“In consideration of the Union Bank of Canada making advances to the Specialty Manufacturing Company, of Grimsby, Ont., either by the discount of negotiable securities, consisting of bills of exchange or promissory notes, or by overdrafts or otherwise, from time to time as the said bank may think fit, I hereby guarantee payment in full of such negotiable securities or overdrafts; but providing that the liability under this guaranty does not exceed the sum of \$2,500 at any one time. This is a continuing guaranty, intended to cover any number of transactions, and I agree that the said bank may deal or compound with any of the parties to the said negotiable security, and take from and give up to them again security of any kind in their discretion, and that the doctrines of law or equity in favour of a surety shall not apply hereto. It is also agreed that the guarantor shall be liable to the extent of the above amount for the ultimate balance remaining after all moneys obtainable from other sources shall have been applied in reduction of the amount which shall be owing from the

Sutherland, J.
1917
UNION BANK
OF
CANADA
v.
MAKEPEACE.

Specialty Manufacturing Company, of Grimsby, Ont., to the said bank; provided that this guaranty shall subsist notwithstanding any change in the partners of the firm, but the said bank shall not be bound to exhaust all such recourse against other parties previous to making demand upon me for payment of above named amount, the intention being that Union Bank of Canada shall have the right to demand and enforce this guaranty, in whole or in part, from the guarantor."

Upon this guaranty an action was brought, and the defendant, an elderly woman, resisted liability on the ground that she did not understand it imposed upon her any financial responsibility. The action was tried before Middleton, J., who came to the conclusion that no fraud, misrepresentation, or misconduct of any kind on the part of the plaintiff bank, when the guaranty was obtained, had been proved; and he accordingly gave judgment for the plaintiff bank for the amount claimed with interest and costs: (1915) 9 O.W.N. 202.

An appeal was taken therefrom, and a note of the judgment of the Appellate Division (17th March, 1916) is found in 10 O.W.N. 28. It upheld the trial Judge in his finding that the defendant had failed to prove that she did not know that what she signed was a guaranty, but varied his judgment by holding that the guaranty was for debts "to be incurred only." I quote from the judgment of the Appellate Division:—

"This Court doth order that the said judgment of the 20th day of November, 1915, be varied, and as varied be as follows:—

"(1) This Court doth declare that the guaranty in the pleadings mentioned is a valid and subsisting security, and doth adjudge the same accordingly.

"(2) And this Court doth further order and adjudge that it be referred to the Master in Ordinary of this Court to take the following accounts and make the following inquiries:—

"(a) To inquire and state what advances were made by the said plaintiff to the Specialty Manufacturing Company between February 2, 1914, and April 23, 1915, under the guaranty in the pleadings mentioned.

"(b) To inquire and state what payments, if any, have been made on account of the said advances."

A reference to the Master in Ordinary followed, and the Master made his report dated the 5th March, 1917.

At the date of the guaranty the account was overdrawn \$922.26. This has been charged against the defendant.

Sutherland, J.

1917

UNION BANK
OF
CANADA
v.
MAKEPEACE.

Masten, J., in his judgment in the Appellate Division, says:—

“I am of opinion, however, that the guaranty is operative only in respect to advances made after its date. The wording of the guaranty itself is not distinct. The more usual form of such a guaranty expressly covers past as well as future advances, and if that were the case evidence would not be admissible to shew the contrary, but here there is no such provision, and I think that the evidence adduced at the trial, not being at variance with the express terms of the guaranty, was properly received, and that it makes it plain that the intention of the parties was that this guaranty should relate only to future advances made by the bank to the principal debtor.”

Between the 2nd February, 1914, and the 23rd April, 1915, notes given by the debtor, the Specialty Manufacturing Company, to the plaintiff bank, matured and were the subject of discounts or renewals, and the bank advanced moneys to the extent of \$266.56 in connection therewith, which the Master has allowed.

The defendant on the appeal from the Master's report says that the interest on the notes so outstanding is not an advance within the meaning of the guaranty. I do not think it was intended that as between the bank and the debtor a line was to be drawn across the account at the date of the guaranty: the customer and bank were to continue their dealings with each other thereafter; and the former, as payments were made, could direct the application to be made thereof. If he did not do so, and they were carried into the account by the bank, the rule in *Clayton's Case* (1816), 1 Mer. 585, at p. 608, as stated by Lord Halsbury, L.C., in *Cory Brothers & Co. Limited v. Owners of Turkish Steamship "Mecca,"* [1897] A.C. 286, at p. 290, would be the one to be applied, namely: “Where an account current is kept between parties as a banking account, ‘there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side; the appropriation is made by the very act of setting the two items against each other’.”

Sutherland, J.

1917

UNION BANK
OF
CANADA
v.
MAKEPEACE.

Applying this principle, it seems to be clear that the item of \$922.26 was thus paid by the earlier payments in the account, which would be properly applicable to it.

It is said that as between the bank and the debtor the account was treated in this way, and that enough payments were made by the debtor between the dates named to pay the said sum of \$266.50, as well as the \$922.26 of the actual overdraft. The debtor made no specific application of its payments, and automatically in the account they were applied in payment of the overdraft and the \$266.50. The account ran on, and, the ultimate overdraft being the amount claimed by the plaintiff bank herein, the Master found and reported the defendant liable therefor. I cannot think that the judgment of the Appellate Division was intended to preclude the debtor from paying, after the date of the guaranty, sums on account of the overdraft and in payment of accrued interest on the notes in connection with advances by the bank subsequent to the date thereof.

In the evidence before the Master, Edward M. Dawson, an assistant-inspector of the plaintiff bank, stated:—

“Q. Current when? A. On the date the guaranty was signed, February 2nd, 1914. The account is operating in the ordinary way, and the first payments that have come in to the credit of the account are naturally to be applied on the oldest existing advance.

“Q. Was the account a continuing account? A. Yes.

“Q. And these payments were made generally on the account? A. Yes, these payments are applied generally on the overdraft.”

The guaranty is a “continuing guaranty, intended to cover any number of transactions,” and one in which the guarantor was to be held liable “to the extent of \$2,500” of the amount “for the ultimate balance remaining after all moneys obtainable from other sources shall have been applied in reduction of the amount which shall be owing from the Specialty Manufacturing Company, of Grimsby, Ont., to the said bank.”

I am therefore of the opinion that the Master was right in finding as he did in clause (1) sub-clause (1) as to the item of \$266.56, and in sub-clause (3) as to the mode of appropriating the payments in connection with the item of \$922.26. Reference to *Thomson v. Stikeman* (1913), 29 O.L.R. 146, at p. 156, 30 O.L.R. 123, at p. 126.

There is no hint in the documents that the credits coming in from the debtor shall only be applied to actual new advances. The payments made by the creditor were appropriate credits in the account, making the earlier credits balance the earlier debts. The debtor placed the money in the banker's hands and in effect said to him, "You apply the money in the account as you like," and payments as received were automatically applied on the earlier debts.

It seems to me this is the proper mode to deal with the account, having regard to the terms of the guaranty and the terms of the judgment of the Appellate Division. I think that it was incumbent upon the guarantor, in a continuing and running account such as this, to prove that the payments have been made and applied on actual new advances—or otherwise they could properly be applied as they were.

On all grounds, I think the appeal from the Master's report must be disallowed with costs.

September 23, 24, and 25, 1918. The appeals were heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

W. S. MacBrayne, for the appellant, argued that it was not open to the plaintiff bank to question the valuation put upon the securities. The conveyances made by the assignee to the plaintiff bank had the same effect as a judgment for foreclosure. The plaintiff bank could not now sue the Specialty Manufacturing Company for the debt, and the surety was, therefore, released. *North of Scotland Mortgage Co. v. Udell* (1882), 46 U.C.R. 511, *per* Hagarty, C.J., at pp. 516, 517, shews that the ordinary presumption in such a case as this is that the charge, as against the mortgagor, is merged, where, as here, there is no evidence to shew a contrary intention: see *De Colyar's Law of Guarantees*, 3rd ed., p. 210; *Forrest v. Gibson* (1890), 6 Man. R. 612. There had been an equitable accord and satisfaction of the plaintiff's claim, which was equivalent to payment. Why did not the plaintiff expressly reserve its rights against the surety, if such was its intention? Reference was made to *Webb v. Hewitt* (1857), 3 K. & J. 438; *Commercial Bank of Tasmania v. Jones*, [1893] A.C. 313, 316; *Arnold v. Playter* (1892), 22 O.R. 608. *Taylor v. Davies* (1917), 41 O.L.R. 403, 41 D.L.R. 510, which followed *Bell v. Ross* (1885),

Sutherland, J.

1917

UNION BANK
OF
CANADA
v.
MAKEPEACE.

App. Div.
1918
UNION BANK
OF
CANADA
v.
MAKEPEACE.

11 A.R. 458, was not as strong a case as this. Counsel also referred to *Deacon v. Driffl* (1879), 4 A.R. 335; *Hart v. McQuesten* (1875), 22 Gr. 133, 140, 151, 155; *North of Scotland Mortgage Co. v. German* (1880), 31 U.C.C.P. 349, 352, where *Finlayson v. Mills* (1865), 11 Gr. 218, is cited. As to the other appeal, which was a question of account, counsel argued that interest on renewals was not an advance within the meaning of the guaranty.

W. N. Tilley, K.C., and *D. C. Ross*, for the plaintiff bank, respondent, contended that the bank could sue on the guaranty so long as it had not precluded itself from suing the principal debtor. There was no doubt about that. Now, had there been any merger of the interests of the mortgagees under the mortgage with those under the transfers from the assignee? The answer depended on intention, which was a question of fact; and that depended a good deal on the evidence of the party whose intention was in question, namely, the bank. The bank had the mortgage and also the equity of redemption. Had these estates merged? They had not. There need not be an expressed intention that the charge should not merge. This intention could be inferred from the surrounding circumstances, and from the benefit which would accrue to the person in whom the two estates vested, from keeping the charge alive: *Forbes v. Moffatt* (1811), 18 Ves. 384, at p. 390; *Grice v. Shaw* (1852), 10 Hare 76; *Swinfen v. Swinfen* (1860), 29 Beav. 199, at p. 203; *Ingle v. Vaughan Jenkins*, [1900] 2 Ch. 368; *Armstrong v. Lye* (1900), 27 A.R. 287; *Macdonald v. Bullivant* (1884), 10 A.R. 582; *Lockhart v. Hardy* (1846), 9 Beav. 349, at pp. 356, 357. Did this transaction shew such accord and satisfaction that the plaintiff could not sue? That was what it all came back to, whether you approached the question by the path of merger or otherwise. Counsel submitted that it did not. As to the plaintiff having deprived the appellant of her right to go in and make a claim on the estate—she knew that she was being sued, and she should have filed a claim. The bank never intended to release the appellant, as evidenced by the fact that at the very time that it was getting the conveyances from the assignee, it had an action pending against her. It must be borne in mind that the plaintiff is a bank, an institution which does not buy real estate. All it wanted was to get its money. On the question of accounts, counsel did not think there was much in controversy. The defendant

admitted that the plaintiff could appropriate payments, but contended that this could not bind the surety. The plaintiff could not see why not.

MacBrayne, in reply.

App. Div.
1918
—
UNION BANK
OF
CANADA
v.
MAKEPEACE.

December 6. FERGUSON, J.A.:—Appeal by the defendant from the judgment of Middleton, J., dated the 9th October, 1917, whereby he determined in favour of the plaintiff bank an issue as to whether or not the defendant had been discharged from her liability to the plaintiff bank, under a written guaranty given to secure the repayment to the bank of a part of the indebtedness of the Specialty Manufacturing Company. In addition to the defendant's guaranty, the bank held as collateral security for its claim against the Specialty Manufacturing Company: (1) a mortgage on the lands of the company; (2) a mortgage on the plant, machinery, and chattel property of the company; (3) an assignment of book-debts.

The Specialty Manufacturing Company on the 9th April, 1915, assigned to W. P. Thompson for the benefit of creditors. Thereupon the bank proved its claim and valued its securities at the amount of the claim as filed—subsequently the assignee, with the approval of the inspectors, conveyed all his right, title, and interest in the mortgaged property to the bank, and received from the bank therefor \$300 and a release of the book-debts.

The defendant contends that the bank must be held to have accepted the conveyances in satisfaction of their claim against the Specialty Manufacturing Company, and to have thus determined any liability she might have been under to pay any part of such debt.

I cannot help but think that the evidence taken before the Master, which explains and throws much light upon the documents in the case, was not as fully considered by the learned trial Judge as it would have been had he not been led away from it by the contentions of the appellant's counsel; for it would appear that counsel at the trial, founding his right to succeed on a view of the law with which the learned trial Judge after consideration did not agree, urged upon the trial Judge the view of the facts which he adopted.

The judgment appealed from is founded upon the hypothesis

App. Div.
1918
UNION BANK
OF
CANADA
v.
MAKEPEACE.
Ferguson, J.A.

that, prior to the conveyances, the assignee had, by an express or implied election, lost his right to redeem, from which it is deduced that the conveyances were mere formalities. The learned trial Judge says (40 O.L.R. at p. 373):—

“All that was done was, that the assignee formally renounced the worthless right to redeem he had already lost, and the creditors formally withdrew a right to rank, which did not exist, against an estate which amounted to nothing—*Ex nihilo nihil fit.*”

I had prepared and at one time intended to incorporate herein a comprehensive review of the facts, in which were set out in order of date all the documents and correspondence, also some of the oral testimony; but, on second thoughts, I have concluded that it is sufficient to say that, after a most careful consideration of the evidence, I am of opinion that the act of the parties, the oral testimony, the documents, and other circumstances proved, are inconsistent with the hypothesis that there was an election by the assignee, and are consistent only with the view that there had not been an election and consequent loss by the assignee of his right to redeem the mortgaged premises, and that the learned trial Judge erred in finding to the contrary, from which it follows that it is unnecessary to consider the interesting questions of law discussed by the learned trial Judge as to whether or not a creditor who has valued his security under the Assignments and Preferences Act, R.S.O. 1914, ch. 134, sec. 25, and has been allowed to retain it, thereby extinguishes his claim against his debtor to the amount at which his security was valued, and as to whether or not that question was decided in *Bell v. Ross*, 11 A.R. 458, or *Taylor v. Davies*, 41 O.L.R. 403, 41 D.L.R. 510.

In my opinion, the rights of the parties must be ascertained on the basis that, at the time the conveyances were made and accepted, there had been no election under the Act, and that the conveyances were given to complete an actual sale of the equity of redemption in the mortgaged premises, and that the questions for our consideration are: What were the terms of sale? Was the sale made on the terms expressed in the resolution of the 8th December, 1915, or did that resolution so inaccurately and improperly state the terms and real intention of the parties that it should be disregarded and the sale be held to have been in fact made without any special terms or intention, express or implied, so that the Court might and

should infer that the mortgagee in accepting the deeds did not intend either to merge his security or to estop himself from thereafter asserting as against the mortgagor a claim for the payment of the mortgage-debt? And could he preserve this latter right and at the same time actually discharge the estate of the debtor and his assignee from any claim in respect of the mortgage-debt?

The terms of sale and intention of the parties thereto are questions of fact, and I shall deal with those questions first.

It is not disputed that the deeds dated the 13th November, accepted and registered some time later, were signed by the assignee as a result of an acceptance by the bank of the assignee's offer of sale under date the 8th November (exhibit 21), which, when read along with exhibit 24, Mr. Tilley urges, furnishes us with the evidence of the contract of sale according to the true intent and meaning of the parties, and which contract, he says, was not, according to the true intent of the parties, varied in form or effect by the subsequent acts or declarations of the parties.

It may be that the bank took and all along entertained a different view of the meaning and effect of the offer of the 8th November from that entertained by the assignee. It is plain that the inspectors and assignee, by the resolution of the 8th December, expressed a different view of the effect of the transaction to that now put forward on behalf of the bank; and it is also clear that the bank knew of the views expressed in that resolution before it accepted the deeds and paid the consideration-moneys therein mentioned; and, unless we can find that the resolution of the 8th December did not express the view of the assignee, I do not see how we can, in face of the bank's acceptance with knowledge of the assignee's views and intention, relieve the bank from the effect of its acceptance.

I am of the opinion that the assignee, in making the offer shewn by exhibits 21 and 24, did not consider that he was making nor did he intend to make an offer on terms differing materially or in effect from the sale which was previously authorised by the inspectors when they instructed the giving and extending of the MacConachie option, which had expired only on the 5th October.

In *North of Scotland Mortgage Co. v. Udell*, 46 U.C.R. 511, Hagarty, C.J., at p. 516, says:—

“The rule of law follows what would surely be the understanding of ninety-nine persons of ordinary intelligence out of one hundred,

App. Div.
1918

UNION BANK
OF
CANADA
v.

MAKEPEACE.

Ferguson, J.A.

App. Div.
1918
UNION BANK
OF
CANADA
v.
MAKEPEACE.
Ferguson, J.A.

that if the mortgagee accept a release of the equity of redemption, nothing further being said on either side, the natural presumption must be that the charge is merged in the complete ownership of the inheritance."

And at p. 517:—

"From all the authorities I gather that in the simple case of the mortgagee taking a conveyance of the equity of redemption, the ordinary presumption is, that the charge, as against the mortgagor, is merged or incapable of being enforced, at least so as to call for evidence to shew a contrary intent or result."

What ground is there for saying that the assignee entertained a view of the meaning and effect of his offer of the 8th November different from what Mr. Chief Justice Hagarty says would be the view of ninety-nine out of one hundred persons? I can find none; and, therefore, I see nothing strange in the assignee, on being asked by Mr. Raymond for evidence of his authority to execute the deed, assuming that the resolution authorising the MacConachie option accurately stated the intent and effect of the transaction proposed by exhibits 21 and 24, and authorised it except that its form might need to be changed so as to permit of some one other than MacConachie's client being the purchaser (if that client was not in fact the bank).

In his oral testimony taken before the Master the assignee takes the position that the resolution of the 8th December actually stated his intention, and that the deed was executed by him under the authority thereby conferred, and the resolution was put forward by the assignee and the inspectors as the evidence of the assignee's right to execute. The plaintiff's local manager joined in the resolution and signed it in the presence of the bank's local solicitor, who witnessed it and caused it to be forwarded to Mr. Raymond as evidence of the assignee's powers; and at the trial the bank's manager says that the deed was executed under the authority of that resolution. Mr. Raymond was quite alive to the necessity of the assignee having directions from either the creditors or the Judge of the County Court before making a sale; and, before advising the bank to accept the deed, register it, and pay the \$300 consideration-money, he asked for and received the resolution of the 8th December; he admits reading it over and advising the bank that it was sufficient to carry out the contemplated purchase and sale; and I

cannot see how there can be any question as to that resolution meaning that the bank was to pay for the property \$300 over the amount of its claim and was also to assign the book-debts. It paid the \$300 and released the book-debts, but now refuses to pay itself.

The resolution of the 8th December reads:—

“Hamilton, Ont., Decr. 8th, 1915.

“Whereas at a meeting of the inspectors of the Specialty Manufacturing Company, held at the Village Inn, Grimsby, on July 13, 1915, at which were present three (3) inspectors of the estate, Messrs. Marsh, Brook, and Darley, the following resolution was passed:

“‘Moved by Mr. Marsh

“‘Seconded by Mr. Brook

“‘That, providing an offer can be secured of sufficient money to pay off the Union Bank’s claim in full, with in addition three hundred dollars (\$300) for expenses of assignee, inspectors, and solicitor, and the balance of the book-debts and trade-paper, now in the hands of the Union Bank, to be handed to the assignee in trust for the creditors, said offer be and is hereby accepted. The assignee is authorised to sell and transfer all the company’s assets other than said book-debts to the prospective purchaser, deal to be consummated thirty (30) days from this date July 13, 1915.’

“And whereas, at a subsequent meeting of inspectors, said date for consummation of the deal was extended to October 5, 1915, we, the undersigned inspectors of the Specialty Manufacturing Company, Grimsby, hereby authorise and instruct the assignee of the said estate to sell the assets as above mentioned to any purchaser on above mentioned terms on or before December 18th, 1915.

“Witness our hands and seals this 8th December, 1915.

“Beverley Brook (seal)

Witness:

“J. A. Marsh (seal)

G. B. MacConachie.”

“E. B. Darley (seal)

What more natural than that Mr. Raymond should think that that resolution accurately expressed even the bank’s real intentions. This debt was incurred at the Grimsby branch of the bank. Mr. MacConachie, the local solicitor, and Mr. Darley, the local manager, were parties to it; the bank had valued the mortgaged premises at a sum exceeding its total claim at the time the writ for foreclosure

App. Div.
1918

UNION BANK
OF
CANADA
v.

MAKEPEACE.

Ferguson, J. A.

App. Div.
1918
—
UNION BANK
OF
CANADA
v.
MAKEPEACE.
—
Ferguson, J.A.

was issued on the 2nd November, 1915; the bank had gone into possession of the premises and not only leased them but had entered into a written agreement binding it to sell the premises to the lessee at his option at a sum which the witness Carter (at p. 137 of the evidence) says was approximately the amount of the bank's claim—and, though it may not have been known to any of the parties at the time, a comparison of the affidavit of claim with the recitals and redemption clauses of the mortgage shews that the mortgages were not in fact (as claimed) held by the bank as security for the total indebtedness.

Every circumstance, except the fact that after taking the deeds the bank did not submit to a dismissal of this action, points to the conclusion that it was a most reasonable thing for the bank to accept conveyances of the properties on the terms of that resolution of the 8th December; and I cannot think that the continuance of this action should be seized upon now and magnified so as to lead us to conclude that even the bank did not intend to do in effect what it did in form. There are other circumstances connected with this transaction which, looking back, are more difficult to explain than why the bank continued the Makepeace litigation. For instance, why, if the bank intended to preserve its rights against Mrs. Makepeace, did not Mr. Raymond reserve its rights against her and the debtor and her rights against the assignee? Or, again, why did the bank, holding securities to the full value of its claim and the guaranty of Mrs. Makepeace in addition, file a claim with the assignee? It was not intending to rank upon the estate. I refuse to speculate as to the why or the wherefore of such actions in arriving at the intention of the parties; I prefer to be guided by what they said and did at the time rather than by argument as to the probabilities or even sworn statements of intention made long after the events, when the circumstances are changed, and other considerations are present to the minds of the deponents and counsel, even if it be assumed that the witnesses are now perfectly honest in giving their recollections and the argument reasonable.

Therefore I find as a fact that the conveyances were given and accepted in satisfaction of the bank's claim against the Specialty Manufacturing Company, and that the defendant was thereby freed from liability. Had I reached a different conclusion and been of the opinion that the real transaction between the parties

was a sale of the equity of redemption by the assignee to the bank, nothing being said on either side, I would nevertheless doubt that the circumstance of the prosecution of the Makepeace guaranty would in itself be sufficient to rebut the usual presumption that the purchaser of an equity of redemption undertakes to indemnify the vendor against the mortgage-debt (*Waring v. Ward* (1802), 7 Ves. 332, 336; *Boyd v. Johnston* (1890), 19 O.R. 598); or that a mortgagee-purchaser accepts the conveyance in satisfaction of the mortgage-debt (*North of Scotland Mortgage Co. v. Udell, supra*); and I would also doubt the right and power of an assignee for the benefit of creditors to enter into a transaction which would release or discharge the obligation which equity attaches to such a sale, an obligation which the assignee must, I think, be taken to hold not only for the benefit of the estate in his hands, but for the benefit of the *cestuis que trust*, which includes the debtor, so as to relieve him of his personal obligation on the mortgage. In other words, I doubt the right of the assignee to sell, assign, or release any equitable rights which accrue to him by operation of law on a sale of the trust estate, and which he must be taken to hold as trustee for the benefit of the debtor, as well as for himself: see *Higgins v. Trusts Corporation of Ontario* (1899), 30 O.R. 684, (1900) 27 A.R. 432, and the authorities and principles there discussed.

But it is not, as I view the case, necessary to decide these questions of law or the question as to what was the effect of the release by the bank of its right to rank upon the estate, without reserving the right of Mrs. Makepeace to do so, as was the case in *Brown v. Coughlin* (1914), 50 Can. S.C.R. 100, 28 D.L.R. 437. I prefer to rest my judgment on the opinions I have expressed in reference to the facts.

This appeal was consolidated with and argued along with an appeal from an order of Sutherland, J., dated the 1st day August, 1917, pronounced on an appeal from the report of the Master on the taking of the accounts; but, if I am right in the view I have expressed on the questions involved in the appeal from Middleton, J., it is not necessary to consider the accounts or to deal with the questions raised on the reference or in the appeal from Sutherland, J.

For these reasons, I would allow both appeals and direct judgment to be entered on further directions, declaring that the

App. Div.
1918
UNION BANK
OF
CANADA
v.
MAKEPEACE.
Ferguson, J.A.

App. Div.
1918

UNION BANK
OF
CANADA

v.
MAKEPEACE.

Ferguson, J.A..

defendant is not indebted; the defendant to have the costs of both appeals and of the proceedings subsequent to the judgment of the Divisional Court directing the reference to take accounts.

MACLAREN, J.A., agreed with FERGUSON, J.A.

MAGEE, J.A.:—I agree with my brother Ferguson that these appeals should be allowed.

There was not, on the agreement for the release of the equity of redemption, any reservation of the bank's rights against the surety; and, in giving up the bank's claim, the bank released any claim the surety might have, and so interfered with the surety's rights.

HODGINS, J.A. (dissenting):—Appeal from the judgment of Middleton, J., dated the 9th October, 1917, finding that the appellant was liable upon a guaranty to the respondent; and also from an order of Sutherland, J., dated the 1st August, 1917, dismissing an appeal from the report of the Master in Ordinary, dated the 5th March, 1917, whereby the amount due by the debtor was fixed at \$3,179.66.

The respondent bank, in addition to this guaranty, had a mortgage on the lands and premises of the Specialty Manufacturing Company and a chattel mortgage on the plant, machinery, and chattels of the company and an assignment of book-debts.

The guaranty was for the ultimate balance, not exceeding \$2,500, after all moneys obtainable from other sources had been applied on the debt.

The company assigned for the benefit of creditors to W. P. Thompson on the 9th April, 1915, and the respondent proved its claim on the 22nd April, 1915, at \$13,707.39, and valued its securities as follows: book-debts, \$250; mortgage and chattel mortgage, \$13,457.39. This action against the appellant was begun on the following day, the 23rd April, 1915. On the 2nd November, 1915, the respondent entered suit for foreclosure in respect of the land mortgage. Subsequent thereto and on the 13th November, 1915, the assignee granted and quitted claim to the respondent all his estate and interest in the lands, for the expressed consideration of \$300. On the 8th January, 1916, the assignee transferred to the respondent the goods and chattels mentioned in the chattel

mortgage, the consideration being stated as "\$300 and other good and valuable consideration."

The appellant contends that this deed of the equity of redemption had the effect of merging the charge created by the mortgage, and that the debt has been extinguished. Looking at the terms of the mortgages, which are limited to securing payment of promissory notes and discounted paper for the sum of \$15,000 and renewals thereof and interest thereon, it would appear that, when the claim was proved, the amount covered by the mortgage was \$12,640.45, while the security therefor was valued at \$13,457.39.

The question to be determined is whether the effect of the transaction above stated was to discharge the debt and so to free the appellant.

A few days after the foreclosure action was begun, namely, on the 8th November, 1915, the appellant's solicitors, who appear to have been acting also for the assignee, wrote the general solicitors in Toronto of the respondent the following letter:—

"We are acting for Walter Thompson, the assignee of the above estate. There were expenses incurred as assignee, and it has been impossible to collect them from any source. We would transfer all the title to you without the proceedings under the foreclosure if you would pay the expenses to date, say about \$300. This would give you immediate possession without any trouble and would also reimburse the assignee for his outlay.

"Let us know whether this would be satisfactory to you."

There is no clear evidence as to when this offer was accepted, but the quit-claim deed was prepared by the assignee's solicitor and sent to the assignee in a letter dated the 16th November, 1915, reading as follows:—

"We enclose quit-claim for signature, which has been approved by G. B. MacConachie. I am going away for a few days, and you can execute it and hand it over to Mr. MacConachie upon receipt of \$300."

On the following day the assignee (exhibit 23) sent the quit-claim deed to Mr. MacConachie, the local solicitor at Grimsby of the Union Bank.

In his evidence, Mr. MacConachie says that he arranged with the assignee that, before paying the consideration-money mentioned in this deed, he would send the document to Messrs.

App. Div.
1918

UNION BANK
OF
CANADA
v.
MAKEPEACE.
Hodgins, J.A.

App. Div.
1918

UNION BANK
OF
CANADA
v.

MAKEPEACE.

Hodgins, J.A.

Raymond & Co., general solicitors for the bank, for their approval and that he did send the document to Toronto.

On the 19th November Thompson wrote to MacConachie a letter (exhibit 24), as follows:—

“While the ‘quit-claim deed’ only included the real estate in this matter, it was understood at the meeting of creditors that I was to convey to the Union Bank, or any other purchaser, all chattels which are not affixed to the freehold. In other words, I was instructed to release, for the amount in question, all the assets of the above company to the Union Bank, which I understand is the arrangement between us.”

The assignee in that letter, in stating that it was understood that he was to convey to the bank “or any other purchaser” all chattels which are not affixed to the freehold, refers to the original meeting of creditors; and the conclusion which he draws from the authority there given is, that he is entitled to convey all the assets to the bank, as well as the real estate covered by the mortgage. As the chattels were all manufacturing plant and machines in the building on the lands, and practically fixtures, the conclusion is not unreasonable.

The respondent’s solicitors having sent over a form of resolution to be passed by the inspectors, the assignee wrote to MacConachie a letter, dated the 22nd November, 1915, which is as follows:—

“I am in receipt of your letter of 20th inst. and note contents. At the original meeting of creditors Messrs. Darley, Brook, and Marsh were appointed inspectors. At the second meeting of creditors, which was called to discuss the position of the Union Bank in the matter, the following resolution was passed:—

“‘Moved by W. S. MacBrayne, acting for Mrs. Woolverton, seconded by E. J. Woolverton, that the whole matter of the realisation of the assets and the position of the Union Bank be considered by the assignee and inspectors, and in consultation with the solicitor for the assignee, Geo. S. Kerr, K.C., the inspectors be given full power to take action or realise upon the assets of the estate in any way that they may deem advisable. Carried.’

“A subsequent meeting of inspectors was held at the Village Inn, Grimsby, at which time the assignee was instructed to sell the assets of the Specialty Manufacturing Company for the sum of \$300.

"If the Union Bank knew these facts, they would perhaps not make it necessary for me to call a general meeting of creditors now. Of course, if it is necessary it can be done, but it will entail considerable expense and trouble to all concerned.

"Kindly let me hear from you, and oblige."

A previous letter of the assignee of the 17th August, dealing with the option given on the 13th July, speaks of extending that option "to purchase our interest in the estate for \$300." This is consistent with the subsequent correspondence, and indicates clearly that the view of the assignee throughout was that the conveyance was to include just the assignee's interest, and the amount received was to pay his expenses. In view of the position taken by counsel for the appellant, the assignee and his solicitor are now put in a singular light. For the letter of the 22nd November gives the meaning of the inspectors' resolution, dated the 13th July, 1915, so much relied on before us, as it was understood by the assignee. The terms of that resolution are as follows:—

"Moved by Mr. Marsh

"Seconded by Mr. Brook

"That, providing an offer can be secured of sufficient money to pay off the Union Bank's claim in full, with in addition three hundred dollars (\$300) for expenses of assignee, inspectors, and solicitor, and the balance of the book-debts and trade-paper, now in the hands of the Union Bank, to be handed to the assignee in trust for the creditors, said offer be and is hereby accepted. The assignee is authorised to sell and transfer all the company's assets other than said book-debts to the prospective purchaser, deal to be consummated thirty (30) days from this date, July 13, 1915."

I do not wonder that, with that letter of the 22nd November before the bank's local and general solicitors, they may have failed to realise that the payment of the \$300 would be used to draw the bank into a position different from that which both parties intended it should occupy.

I am quite unable, upon these documents or upon the evidence given at the trial, to conclude that what the assignee offered to give, and what the bank's solicitors agreed to pay for, can be stretched so as to include satisfaction of the large debt of the bank and the consequent release of the surety then being vigorously sued. The trial of the case against her took place on the 25th

App. Div.
1918

UNION BANK
OF
CANADA

v.
MAKEPEACE.

Hodgins, J.A.

App. Div.
1918
UNION BANK
OF
CANADA
v.
MAKEPEACE.
Hodgins, J.A.

October, 1915, and the judgment was pronounced on the 20th November, 1915, so that it seems idle to suggest that the respondent was actively engaged in giving away its rights against the surety during the period just subsequent to the trial, or that, after judgment had been given in its favour, it registered a deed defeating it.

With the exception of the forwarding of a copy of the resolution of the 13th July, 1915, and the extensions of the time-limit thereafter given, everything done and written by the parties, both before and after, is opposed to the argument that the bank was proceeding as a purchaser upon that resolution, instead of carrying out the simple transaction of acquiring by deed the equity of redemption in lieu of foreclosing it. The assignee himself suggested transferring the machinery and chattels as already mentioned; and, if the bank allowed the assignee to collect the book-debts, that does not do more than make it accountable for the amount realised as a credit on the amount due the bank—they were valued at only \$250. And, as the amount due is \$3,179.66, and the sum collected was said to be about \$300, the appellant would derive no benefit from an account.

Assuming then that the real bargain was as I have indicated, the question arises: what was the effect of it, coupled with the formal withdrawal by the bank of its claim upon the estate on the 7th January, 1916? Merger is, of course, a question of intention as between the parties to the dealing which is said to produce it.

The bank had, through its agent, a prospect of realising upon its security by disposing of the property. It had proved its claim in such a way as to entitle it to retain its security or to require the assignee to take it over at a 10 per cent. advance. The right of foreclosure existed, subject to this statutory option, and the getting in of the equity of redemption would, provided the assignee agreed to give it up, enable a sale to go through whereby the whole purchase-money was to go in discharge of the debt—without any question being raised as to title because of the assignee's outstanding equity or his statutory rights.

The bank was, as banks always are, desirous of liquidating its security, and it would have been folly in it to have done anything which could have resulted in compelling it to accept the property

in discharge of its debt, especially as the chance of selling appeared to be fading away.

It was also at the moment actively pursuing the surety by action upon the bond.

Under these circumstances, no intention to merge the debt can or ought to be implied from the transaction. Where the fact was that merger would be clearly against the interests of both parties concerned that consideration was held to be sufficient to rebut any such presumption. This I believe to be the *ratio decidendi* of such cases as *Adams v. Angell* (1877), 5 Ch.D. 634; *Thorne v. Cann*, [1895] A.C. 77; *Liquidation Estates Purchase Co. v. Willoughby*, [1896] 1 Ch. 726, 734, [1898] A.C. 321; *Ingle v. Vaughan Jenkins*, [1900] 2 Ch. 368; *Marks v. Whiteley*, [1912] 1 Ch. 735, 760.

It was not to the advantage of the bank to release its debt, and the interest of the assignee was in no way served by such a release. All he desired was to get enough to pay his expenses and to be formally cleared of responsibility in regard to the bank as a creditor.

Furthermore, the appellant must be held to have undertaken her liability upon an understanding similar to that stated in the case of *Rainbow v. Juggins* (1880), 5 Q.B.D. 422, 423, thus:—

“Where a man enters into a contract of suretyship, he, it is true, bargains that he shall not be prejudiced by any improper dealing with securities to the benefit of which he as surety is entitled; but he makes that bargain with reference to the law of the land, and if the law of the land says that under such and such circumstances certain things must take place in order to enable the creditor to do the best he can for his own protection, then the contract of suretyship must be taken to be made subject to the liability of those things taking place.”

As I understand the figures stated in its formal claim, the bank was precluded by the statute from receiving anything out of the estate, if the assignee accepted the proof and did not elect to take over the security. The valuation of the security was larger than the claim recoverable under the mortgage by \$816.94, and the only right the creditor had was to rank for its claim after deduct-

Value.....	\$13,457.39
Mortgage debt	12,640.45
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	\$ 816.94

App. Div.
1918

UNION BANK
OF
CANADA
v.
MAKEPEACE.
Hodgins, J.A.

App. Div.
1918

UNION BANK
OF
CANADA
v.
MAKEPEACE.

Hodgins, J.A.	Value.....	\$13,457.39
	10 %	1,345.73
		<hr/>
		\$14,803.12
	Mortgage-debt	12,640.45
		<hr/>
		\$ 2,162.67

ing the valuation, i.e., in this case nothing, or to rank for the difference between the stated value and the gross claim if the assignee elected to take over the security. If he did so take it over, the assignee would have had to pay the valuation plus an increase of 10 per cent., which would be \$2,162.67 more than was recoverable under the mortgages according to their terms, because they do not cover the overdraft amounting to \$1,066.94.

Can it then be said that, in withdrawing a claim on the estate, the bank gave up anything? I think not. The statute had taken it away before the release was given, because, under it, it was impossible for such a claim to rank, and the release of the equity of redemption put an end to the assignee's taking the security over. It is not the filing of the claim but its being entitled to rank that must determine the rights of the parties: *Deacon v. Driffl*, 4 A.R. 335.

As I understand the law, a creditor can recover against a surety although he has not proved on the estate of the debtor, and he is not bound to prove unless he has been required to do so by the surety. But if he does prove he is not entitled to withdraw that proof to the detriment of the surety, unless the guarantee-agreement permits him to do so, without being liable to account for what may have been lost by not persisting in his proof. I can see, however, no possible harm or loss by what was done. There were no assets outside the securities held by the bank; and, if there had been, the statute itself made it impossible, as events turn out, for the bank to make out any claim upon them.

The result of the release of the equity of redemption was to vest in the bank the legal and equitable estates; so that, in the event of the surety paying the debt, the security could be turned over to her not only unimpaired but enhanced by what was done.

I do not regard the release by the assignee as precluding action on the covenant against the debtor. It is not the scheme of our Act to discharge the debtor when he makes an assignment for the benefit of his creditors. It simply creates a trust fund for the payment of debts, and leaves him liable for the debt less what the

secured creditor may receive from the assignee. If the effect of what was done was to extinguish the right of the assignee to redeem, yet the creditor could still sue the debtor, who, notwithstanding a foreclosure or a release by the owner of the equity of redemption, remains liable, subject only to the condition that the mortgagee must be able to restore the pledged estate on payment being made: *Walker v. Jones* (1865), L.R. 1 P.C. 50; *Kinnaird v. Trollope* (1888), 39 Ch.D. 636; *Stark v. Reid* (1895), 26 O.R. 257.

It is not necessary, in view of the facts of this case, to consider the effect of the decision of *Bell v. Ross*, 11 A.R. 458, discussed in *Taylor v. Davies*, 41 O.L.R. 403, 41 D.L.R. 510.

This appeal from the judgment of Middleton, J., should be dismissed with costs.

In regard to the appeal from Mr. Justice Sutherland's judgment, I agree with his conclusions.

The item of \$266.56 is properly charged as made up of new advances. The discounts of new notes renewing old ones were put to the credit of the account, which was charged with the overdue notes: the difference, which represented the interest or discount on the new note, increased the overdraft, and was a new item, and I think a new advance within the meaning of the guaranty as expounded by the Second Divisional Court. But as to this item and that of \$922.26 (the amount due before the guaranty) the moneys which came in afterwards were either automatically or in the case of the \$922.26 specifically, though subsequently to the last judgment herein, applied upon them, and so they disappear. I think the rule in *Clayton's Case* was properly applied. See *Cory Brothers & Co. Limited v. Owners of Turkish Steamship "Mecca,"* [1897] A.C. 286.

As to the remaining contention that the balance due is only \$706.98, instead of \$3,179.66, this does not appear to have been before Mr. Justice Sutherland. But, having gone through the calculations submitted, I think the respondent's solicitors have reached the correct result from the actual dealings between the parties. Practically the difference between the two totals is produced by ignoring all the discounts granted during that time, and treating the difference between the debit and credit sides of the current account due to them as if they did not exist and had never

App. Div.
1918
UNION BANK
OF
CANADA
v.
MAKEPEACE.
Hodgins, J.A.

App. Div.
1918
—
UNION BANK
OF
CANADA
v.
MAKEPEACE.
—
Hodgins, J.A.

existed. Most of these are covered by the doctrine of the appropriation of payments already referred to.

I think the appeal from Mr. Justice Sutherland's judgment should be dismissed.

Appeals allowed (HODGINS, J.A., dissenting.)

1918
—
Dec. 6.
—
1919
—
Jan. 15

[IN CHAMBERS.]

REX V. HACKAM.

Alien Enemy—Magistrate's Conviction for Neglecting to Register—Dominion Order in Council of 20th September, 1916—Permanent Place of Residence—No Evidence to Support Conviction—Attempt to Support under Subsequent Orders in Council—Failure upon Evidence—Order Quashing Conviction—Improper Conduct of Magistrate and Prosecutor—Order for Costs—Refusal of Protection against Action—Affidavits—Re-opening Motion to Quash after Order Pronounced but before Entry—Duties of Magistrates.

The defendant, who was born and had lived under Turkish rule, but said that he was a Syrian and a Christian, had lived for some time in Canada, but was not naturalised, and had not been registered as an alien enemy. He was, on the 27th August, 1918, convicted by a magistrate "for that he," the defendant, "did neglect to register as an enemy alien, as required by order in council P.C. No. 2194 of September 20th, 1916." The order referred to requires every alien enemy who has no permanent place of residence or abode in Canada to report within 20 days. There was no evidence before the magistrate that the defendant had no such place of residence; and, upon a motion to quash the conviction, it was admitted by the magistrate and prosecutor that the conviction could not stand as for an offence under the order referred to; but it was urged that the conviction could be supported under either one of two subsequent orders in council:—

Held, without considering whether the conviction could be amended so as to bring it under one or other of the subsequent orders, that on the evidence no charge under either could succeed; and the conviction was, therefore, quashed.

Held, also, upon affidavits filed upon the motion to quash, and affidavits in answer filed by leave after the order quashing the conviction had been pronounced but before it had been passed and entered, that the conduct of the magistrate and prosecutor towards the defendant was so improper that they should be ordered to pay the costs of the motion and should not be protected in respect of any action which the defendant might bring. The proceedings before the magistrate were considered a travesty of justice. Remarks upon the duties of magistrates and the remedy where they decline to perform their duties.

Motion to quash a conviction of the defendant, by the Police Magistrate for the Town of Bracebridge, "for that he, the said Sam Hackam, did neglect to register as an enemy alien, as required by order in council P.C. No. 2194 of September 20th, 1916."

December 3. The motion was heard by RIDDELL, J., in Chambers.

H. H. Davis, for the defendant, the applicant.

W. R. Smyth, K.C., for the magistrate and the prosecutor, the respondents.

1918
—
REX
v.
HACKAM.

December 6. RIDDELL, J.:—On the 27th August, 1918, R. H. Stewart, of the Dominion Police, laid an information before Mr. White, Police Magistrate at Bracebridge, charging "that Sam Hackam, an enemy alien, has neglected to fulfil the requirements of P.C. No. 2194 of September 20th, 1916." On the same day the accused appeared before Mr. White on this charge and pleaded "not guilty."

The prosecutor had "no evidence to give except that he believes he is an enemy alien"—the accused said: "I am not a Turk but a Syrian belonging to the Lebanon District. I was born and lived under Turkish rule but I am a Christian. I have no passport; I am not naturalised; and I have not been registered as an alien."

The Police Magistrate says: "This man has no papers of any kind to prove his nationality except a letter from another man calling himself a Syrian, saying that he (Hackam) is a Syrian." A conviction was made "for that he, the said Sam Hackam, did neglect to register as an enemy alien, as required by order in council P.C. No. 2194 of September 20th, 1916." A fine of \$250 was imposed and in default of payment imprisonment for two months. Hackam went to gaol, but next day paid the fine. He now moves to quash the conviction.

The P.C. No. 2194 is to be found in the Canada Gazette Extra of the 25th September, 1916, also in "Proclamations, Orders in Council, and War Documents, 4th Supplement," pp. 2375-2378: it requires every alien enemy who has no permanent place of residence or abode in Canada to report within 20 days. There was no evidence that the defendant had no such place of residence: he swears in an affidavit filed on this application that he has and for many years has had a permanent place of residence in Canada, to the knowledge of the magistrate. This is not disputed, and the respondents admit that the conviction cannot stand as for an offence under this order P.C. 2194.

It is, however, urged that the defendant should be convicted

Riddell, J.
1918
REX
v.
HACKAM.

under order 1908 of the 5th August, 1918: Canada Gazette of the 17th August, 1918, pp. 672, 673. This order in council cancels P.C. 2194, and provides that every alien of enemy nationality residing or being in Canada shall, unless previously registered or reported, report within 20 days after the publication in the Canada Gazette. The publication being on the 17th August, every enemy alien (at least if he did not come under P.C. 2194) had until the 6th September to report, and he was not in default until the end of that day.

The defendant could not be convicted on the 27th August of an offence of which he could not be guilty till the following month: order 1908 therefore does not assist the respondents.

Then it is said that in any event the defendant is guilty of an offence under order 1013 of the 30th April, 1918: Canada Gazette Extra, of the 11th May, 1918—that provides that: “Upon and after the 1st day of June, 1918, every male person who is not on active service in any of His Majesty’s Naval or Military Forces or in the Naval or Military Forces of any of His Majesty’s Allies, and who apparently may be, or is reasonably suspected to be, within the description of class 1 under the Military Service Act, 1917, by whom or on whose behalf it is at any time affirmed, claimed or alleged that he is not, whether by reason of age, status, nationality, exception, or otherwise, within class 1 under the Military Service Act, 1917, as defined for the time being; or that, although within the said class 1, he is exempted from or not liable to military service; shall have with him upon his person at all times or in or upon any building or premises where he at any time is,” some prescribed form of certificate; and prescribes a penalty of \$50 for breach.

Here there is nothing to shew that the defendant apparently was or was suspected of being in class 1 under the Military Service Act, 7 & 8 Geo. V. ch. 19. Class 1, by that Act, sec. 3(1), consists of “those who have attained the age of 20 years and were born not earlier than the year 1883 and are unmarried, or are widowers that have no child.” There was no evidence before the magistrate, and there is none before me, of any one reasonably suspecting him to have been born not earlier than 1883 (he swears now he was born in 1882, but I pay no attention to that). I know nothing of whether he “apparently may be” in class 1—he may look as old

as Methusaleh for anything that appears before me. If the magistrate, seeing him, had certified that he apparently was in class 1, the case might be different: but his mind was not directed to such a matter.

I have not considered whether I have the power to amend the information and (or) conviction so as to bring the case within order 1013 or 1908: I am clearly of opinion that on the evidence no charge under either could succeed.

The conviction must be quashed.

From the uncontradicted affidavit of the defendant it appears that, at the outbreak of the war, he applied to Mr. Snow, K.C., Registrar of Aliens, and was told by him that he need not report any more, as he (Mr. S.) was not requiring Syrians to report, and Mr. Snow, on the 13th February, 1915, gave him a paper signed by himself: "Sam Hackam, of 752 Broadview avenue, whose signature appears below, having subscribed to the undertaking by law required, is not subject to interference whilst he complies with its provisions." He further swears that he was in business in Bracebridge from 1906 until 1916, and was well known to the magistrate—that at the trial he was not allowed to communicate with a lawyer, and that the officer said that he did not deserve a lawyer, but that what he (the officer) should do was to tie him up and whip him. This is not contradicted.

The conviction will be quashed, with costs payable by magistrate and prosecutor, and there will be no order of protection.

The Registrar will send the original affidavit to the Attorney-General that inquiry may be made into the conduct of this magistrate—and, if necessary, proceedings taken if the alleged facts are not true. A copy of the affidavit will be sent to the Minister of Militia and the Chief of the Dominion Police, that the conduct of the "Dominion policeman may be investigated." In every case a copy of this judgment should also be forwarded.

The whole proceedings are a travesty of justice and such as should not be tolerated in any civilised community.

January 15, 1919. RIDDELL, J.:—In this case, which came before me in Chambers some weeks ago, counsel for the respondents applied to me for leave to meet the affidavit of the defendant concerning his treatment by the magistrate and the prosecutor, saying

Riddell, J.

1918

REX

v.

HACKAM.

Riddell, J.

1919

REX

v.

HACKAM.

that he had not understood that that affidavit could or would be used. Of course the affidavit could not be read on the merits, and I so stated upon the hearing; the only place in which it appears in the judgment (except on the question of costs) is in referring to a charge upon which it was admitted the prosecution would fail. But such affidavits, shewing the conduct of the parties, are constantly being looked at on the question of costs. There having apparently been a genuine misunderstanding, I stayed the issue of the order to allow evidence to be adduced of the conduct of the magistrate and officer toward this man.

Of course the defendant objected; but it is clear that, until an order is passed and entered, a Judge can always reconsider his judgment—see the cases cited by Mr. Holmsted, Judicature Act, pp. 1138, 1139—and an order made as this was made (as to costs) without the one party answering material allegations of the other, because of a misunderstanding, is an order which may well be held up to enable both parties to be heard.

I gave both parties until the 13th January to file affidavits, refusing to take statements *vivâ voce*.

On the merits, I see no reason to change my view that the conviction cannot stand.

The affidavits filed by the respondents are mainly taken up with allegations against the defendant and a man who looks like him—and are largely irrelevant. Hackam was not on trial for violating town by-laws, for peddling without a license, for frightening and taking liberties with women, for assaults, etc., etc.; and I am wholly at a loss to understand how any one could imagine allegations such as these of any relevancy here. If they have any significance at all, it is in shewing that Stewart undoubtedly had a very bad opinion of Hackam.

There are, however, two sets of statements which have a bearing on the matter, i.e., as to (1) what took place before the magistrate, and (2) the reputation of Hackam for veracity.

Hackam says that from the time he was arrested until he was convicted he was not allowed to use a telephone or communicate with any one, although he requested permission to telephone. This is nowhere denied, but Stewart says that he had no knowledge that Hackam was not allowed to use a telephone or communicate with any one whom he requested to be allowed to communicate

with; that it was a matter for the gaoler. The magistrate says that he has since been informed that Hackam "spoke to the constable and requested permission to go out to get a lawyer," but he adds that this did not come to his knowledge.

Hackam says that at the time of the trial he asked for a lawyer, and that this was refused by the magistrate; the magistrate and Stewart both deny this, as does one Fraser of the Dominion Police Force. Hackam says that Stewart said that what he (Stewart) should do to him was to tie him up and whip him; the magistrate says that after the conviction Stewart said that he would like to whip him and men like him as long as he would stand, or words to that effect. Stewart says that after the conviction reference was made to alleged offences committed by the defendant and one Nassar against women, and he said that, if he did to him what he would like to do, he would tie him up and horsewhip him within an inch of his life.

It will thus be seen what consideration this unfortunate foreigner, charged with an offence against an order in council, received at the hands of officers of the Crown, representing the majesty of Canada.

Then there are four affidavits as to the reputation of Hackam. That of the magistrate is not evidence at all; he does not swear that he would not believe Hackam on oath; all that he says is that "from the general reputation of Hackam and his cousin Nassar . . . these men are considered to be persons of bad reputation and undesirable citizens." Even supposing that the magistrate's evidence could be received at all—as he does not otherwise qualify: *Mawson v. Hartsink* (1802), 4 Esp. 103—the affidavit is *nihil ad rem*.

The town clerk, formerly clerk of the Police Magistrate's court, does "unhesitatingly say that Sam Hackam is a most undesirable citizen," but that is not in issue. Two persons are produced who swear that from his reputation they would not believe him on oath. One of these affidavits—by a butcher—is almost regular in form; the other, by the married woman with whom Hackam boarded for three years, is not so irregular that it can be rejected; and I read both.

Hackam swears that he was totally unaware of his having such a reputation and that he knows no foundation in fact for any such

Riddell, J.

1919

REX

v.

HACKAM.

Riddell, J.

1919

REX

v.

HACKAM.

reputation. It would appear that a number of persons spoken to by the magistrate and by Hackam declined to make affidavits against or for.

Affidavits such as these to the credit of a witness are difficult to weigh. The Judge does not see the deponents and has no means of determining whether the attacking witnesses or he whom they attack should be believed; and these affidavits do not help much, if at all, in determining the fact.

I think I should not pass upon the affidavits of Hackam on the one hand and those adduced by the respondents on the other. All that may and should be passed on by a jury.

Treating this case on the admitted facts, this man was arrested under a charge which did not lie, and convicted under an order in council which any reasonable man must see did not cover his case. With the most anxious desire that the Government, representing the people of Canada, should not be hampered, but on the contrary should be assisted in every step which they think necessary or proper to win the war—for if the war were lost nothing else mattered—the officers charged with the observation of aliens and the like should see that they keep within the law. If ever they could be pardoned for transgressing the law, it would not be in the case of a single Syrian, well-known in the neighbourhood, whose case could not call for haste. The prosecution was wholly inexcusable, unfounded, and unlawful.

I am now to determine whether this man who has been wronged is to be obliged to pay for obtaining his plain rights under the law, or are they to pay who have wronged him, whether through stupidity or through malice? To ask that question is, surely, to answer it.

It might have been expected that, when the respondents found they had been wrong, they would gladly have consented to the wrong being righted so far as it could be; instead of that, there is no word of apology, no word of regret even, but they have put on the files of the Court *in perpetuam memoriam* affidavits filled with entirely irrelevant charges against the character of the defendant, apparently with a view to prejudicing the Court against him.

I can see nothing in the case justifying me in relieving the respondents from the payment of the costs.

As to an order for protection, the simple, plain facts are that Hackam is arrested upon a charge of which he is admittedly not guilty. There is not one word of evidence against him. The magistrate expressly says, "Constable Stewart has no evidence to give except that he believes he is an enemy alien," and then apparently Hackam is called on for his defence; and then he is convicted of something as to which there is no evidence.

I can see no possible ground for protecting the respondents. If Hackam desires the opinion of a jury of Canadians as to whether what the magistrate did was done maliciously and without reasonable or probable cause—Public Authorities Protection Act, R.S.O. 1914, ch. 89, sec. 3—he should have the right to take that opinion; all the circumstances of the case will be open to the consideration of the jury, and they will do justice between man and man. At all events, I shall not close His Majesty's Courts against the stranger in the land.

The above had been formulated when, at the last moment, I received an additional argument from counsel for the respondents. I presume it is intended as an argument, and not as a mere *brutum fulmen*, and deal with it accordingly.

Counsel says: "The Government has decided to prosecute generally and vigorously defaulters under the Military Service Act, and I feel it my duty to say to you that I have been informed by officers of the Dominion Police with whom I am in touch in this work, that the judgment in the *Hackam* case has made certain magistrates reluctant to act at all in connection with these prosecutions."

This is no legitimate argument. The Court has nothing to do with the policy of the Government. The Government under their responsibility to the people of Canada will, of course, choose the policy best adapted in their opinion to advance the interests of the country, and the Court cannot, and does not desire to, interfere or criticise in any way. I may, however, be permitted to say that, with a tolerably wide acquaintance with the members of administrations past and present, I have yet to know of one who would desire the imprisonment of a resident of Canada for an offence which he had not committed.

As to magistrates, I should be glad to know that this judgment induced Justices of the Peace to act with caution and not send a

Riddell, J.
1919
—
REX
v.
HACKAM.

Riddell, J.

1919

REX

v.

HACKAM.

man to gaol without being very sure that he is guilty of an offence against the law. Nothing in this judgment should deter any magistrate from doing his duty, i.e., determine the law and the facts and apply the law to the facts. It may, and I hope will, deter magistrates, who should remember that they are judicial and not administrative officers, judges not employees, from taking charges as proved without the investigation of law and fact.

If there be any magistrates who decline to do their duty by hearing prosecutions of this character, the writ of *supersedeas* is as valid to remove them as it has been for centuries. It has been effectively used in my time to remove a Police Magistrate—and it may be used again if necessary. We need fear no dearth of magistrates.

This case, after winnowing out the irrelevant chaff, has still a few grains of matter. These are questions of fact upon which it is hard to see how the parties could honestly differ. I am not sure that perjury is on the increase in our courts, but it is quite too common. The original affidavits will be sent to the Attorney-General for such action (if any) in the premises as he may think proper. In justice to the Dominion officers, Stewart and Fraser, copies of their affidavits will be sent to the Ottawa authorities as before, in every case accompanied by a copy of this judgment.

[MIDDLETON, J.]

1918

Dec. 6.

BARR V. TORONTO R.W. CO. AND CITY OF TORONTO.

Street Railway—Injury to Person in Highway by outward Swing of Rear Steps of Car—Negligence—Proximate Cause of Injury—Liability.

Where the proximate cause of an injury to the plaintiff was the negligence of the servants of the defendant street railway company in starting a car upon tracks laid upon a highway when the plaintiff was in such a position in the highway that it was plain that there was no escape from the swing of the rear steps outward as the car rounded a curve, the company was *held* liable.

A car must not run down persons who are in a dangerous position in front of it, and there is a precisely similar obligation towards persons who are in danger from the lateral motion.

ACTION by a man and his wife to recover damages arising from an injury to the wife, upon McCaul street, in the city of Toronto, after she had alighted from a car of the defendant railway com-

pany, by reason, as the plaintiffs alleged, of the negligence of the servants of the company or of those of the defendant city corporation in charge of a waggon, owned by the corporation, standing in the street.

December 5. The action was tried by MIDDLETON, J., without a jury, at a Toronto sittings.

William Proudfoot, K.C., for the plaintiffs.

H. H. Dewart, K.C., and *G. S. Hodgson*, for the defendant railway company.

C. M. Colquhoun, for the defendant city corporation.

December 6. MIDDLETON, J.:—McCaul street is very narrow. A double line of tracks runs from the north and turns east on Queen street. The distance from track to kerb is 12 feet, and, as the cars round the curve, the steps at the rear swing some 6 feet over this narrow roadway.

On the day of the accident, a team and large waggon, owned by the defendant city corporation, was removing snow from McCaul street, and at the time of the accident was standing on the road just above Queen street while being loaded.

The plaintiff and her sister-in-law had been passengers on the car and had alighted for the purpose of making a transfer to a Queen street car, and would have gone from the McCaul car west to the walk and then across Queen street, had the conditions been normal. There was, however, a foot of water and slush between the place where they alighted from the car and the walk, and to avoid this they passed north between the car and the waggon to reach ground from which snow and slush had been removed. The space between the car and the waggon was between 3 and 4 feet. When they were about the middle of the waggon, the car started round the curve, and the rear steps swinging sideways passed a few inches from the waggon, and before the plaintiff could escape she was struck and injured.

The obligations of the railway company to the plaintiff as its passenger were ended when she reached a place of safety upon the road, and the liability of the railway company to her must be based upon its obligations to individuals lawfully upon the street.

The conductor says that his duty begins and ends with seeing

1918
BARR
v.
TORONTO
R.W. Co.
AND
CITY OF
TORONTO.

Middleton, J.

1918

BARR

TORONTO

R.W. Co.

AND

CITY OF

TORONTO.

that passengers make safe ingress and egress by the rear door—that he has no duty toward pedestrians upon the road.

The motorman cares for passengers at the front door, and takes care that he does not run any one down by the forward motion of the car.

No one takes any precaution against the obvious danger to persons on the road by reason of the sideward swing of a car which has a wheel base much shorter than its length when it goes round a curve. The railway company must not run down persons who are in a dangerous position in front of a car; and there seems to me a precisely similar obligation toward persons who are in danger from the lateral motion. The conductor might well be called upon to see that all is safe before he signals the motorman to round a curve. The proximate cause of this accident was the negligence of the railway company in starting its car when the plaintiff was in such a position that it was plain that there was no escape from the swing of the rear steps.

No case was made against the city corporation.

There was a serious injury, but I think the recovery will be as substantially complete as it can be in cases of this description.

I award the plaintiff \$1,000, and her husband, who joins in the action, \$350, with costs against the railway company, and dismiss the action with costs so far as the city corporation is concerned.

[IN CHAMBERS.]

1918

Dec. 7.

MCCURDY V. OAK TIRE AND RUBBER CO. LIMITED.

Discovery—Production of Documents by Stranger to Action—Rule 350.

An order obtained by the plaintiff, under Rule 350, requiring a company (not a party to the action) to produce documents for inspection by the plaintiff before the trial, was set aside.
Purpose and scope of the Rule explained.

AN appeal by the defendants from an order of the Master in Chambers, made at the instance of the plaintiff, under Rule 350,* requiring the Imperial Trust Company of Canada (not a party to the action) to produce documents for inspection by the plaintiff.

November 12. The appeal was heard by MIDDLETON, J., in Chambers.

C. W. Plaxton, for the defendants.

T. R. Ferguson, for the plaintiff.

December 7. MIDDLETON, J.:—Since this appeal was heard, the action has been tried, and it is not necessary to deal with the questions discussed.

I am clear that Rule 350 was intended to simplify the procuring of evidence, and to avoid the taking of a witness who is the custodian of documents to a trial, and was not intended to be a means of obtaining discovery from strangers to an action.

Incidentally information may be obtained before a trial—e.g., when a banker is compelled at an earlier stage than usual to disclose his customers' accounts—but this is not the main but a subsidiary purpose of the Rule, and care must be exercised in all applications under it to avoid abuse.

The order here should be vacated, and there should be no costs here or below.

*350. When a document is in possession of a person not a party to the action and the production of such document at a trial might be compelled, the Court may at the instance of any party, on notice to such person and to the opposite party, direct the production and inspection thereof, and may give directions respecting the preparation of a certified copy which may be used for all purposes in lieu of the original.

[APPELLATE DIVISION.]

1918

Dec. 7.

RE GLASS V. GLASS.

*Division Courts—Jurisdiction—Claim for \$96 for Conversion of Goods—
Division Courts Act, sec. 62 (1).*

The plaintiff sued in a Division Court for \$96, the price of hay "taken by the defendant:"—

Held, that, although the plaintiff's title to the hay rested on contract, his complaint was for conversion, the action was founded on tort, and the amount of the claim was beyond the jurisdiction of the Division Court: Division Courts Act, R.S.O. 1914, ch. 63, sec. 62 (1).

Bryant v. Herbert (1878), 3 C.P.D. 389, *Sachs v. Henderson*, [1902] 1 K.B. 612, and *Edwards v. Mallan*, [1908] 1 K.B. 1002, followed.

MOTION by the defendant for prohibition to a Division Court.

November 8, 1918. The motion was heard by MIDDLETON, J., in Chambers.

D. C. Ross, for the defendant.

J. H. Naughton, for the plaintiff.

December 7. MIDDLETON, J.:—The sole question is whether this action is founded on contract or on tort.* Other grounds were taken in the material and were abandoned.

The claim is "for the sum of \$96, being the price for 8 tons of hay, at \$12.00 per ton, taken by the defendant."

The plaintiff and defendant are brothers, and along with others were tenants in common of a farm. There was a partition and an adjustment of claims. Some hay upon the farm, it is said, was allotted to the plaintiff, but the defendant, it is said, took it and converted it to his own use.

The action was tried by a jury, and the jury has found for the plaintiff. The facts and merits of the dispute are to some extent dealt with in the affidavits, but from them it is impossible to form any opinion as to the real situation.

The defendant's main contention seems to have been that the question as to this hay was covered by the disputes included in the adjustment of accounts in the partition proceedings. The plaintiff contended that the present dispute arose out of a subsequent

*By sec. 62 (1) of the Division Courts Act, R.S.O. 1914, ch. 63, a Division Court has jurisdiction in an action founded on tort only up to \$60.

transaction by which it was agreed that the hay in question should be his, but the defendant in violation of this agreement took it.

The plaintiff's title rested on agreement and contract, but his complaint here is for conversion, and so the action is founded on tort.

Sachs v. Henderson, [1902] 1 K.B. 612, is the leading case. *Edwards v. Mallan*, [1908] 1 K.B. 1002, is the latest.

In *Bryant v. Herbert* (1878), 3 C.P.D. 389, an action of detinue is said to be founded on tort, the wrongful detention being the foundation of the action, and not the contract under which the plaintiff acquired his title.

The prohibition must be granted with costs, which I fix at \$20.

I venture to suggest that these parties have had enough law and would be wise to drop all contention without costs, remembering what was said long ago: "He who loves law dies either mad or poor."

The plaintiff appealed from the order of MIDDLETON, J.

January 15, 1919. The appeal was heard by RIDDELL and LATCHFORD, JJ., FERGUSON, J.A., and ROSE, J.

J. H. Naughton, for the appellant.

J. Gilchrist, for the defendant, respondent, was not called upon.

THE COURT, at the conclusion of the argument for the appellant, dismissed the appeal with costs, being of opinion that the action was clearly in tort.

Middleton, J.

1918

RE
GLASS
v.
GLASS.

1918

[IN CHAMBERS.]

Dec. 9.

RE ONTARIO TEMPERANCE ACT.

RENAUD'S APPLICATION.

Ontario Temperance Act—Shipment of Intoxicating Liquor from Quebec to Manitoba—Shipment as "Pickles"—Use of Names of Reputable Companies as Consignor and Consignee without their Knowledge—Seizure of Liquor en Route at Town in Ontario—Jurisdiction of Magistrate for Town to Order Confiscation—Motion to Quash Order—Locus Standi of Applicant—"Owner"—Intention to Violate Act—Onus—Liquor Found in Ontario—Sec. 70 (9) of Act.

A large number of barrels, said to contain pickles, were shipped by railway from Montreal to Winnipeg, consigned as pickles, in the name of a reputable commercial company in Montreal, to a reputable commercial company in Winnipeg. *En route*, at a town in Ontario, an accident happened to the car in which the barrels were, and they were found to contain bottles of intoxicating liquor. The liquor was seized by an inspector, and the Police Magistrate for the town made an order directing its condemnation. At the hearing before the magistrate, counsel appeared "for the person who is claiming the liquor," but this person was not named, nor was there any evidence as to ownership. It was admitted that the names of both consignor and consignee were used without their knowledge. A motion to quash the magistrate's order was made on behalf of R., but there was no affidavit by him nor any indication that he was the owner of the liquor:—

Held, that R. had no *locus standi*.

- (2) That the facts shewn indicated an intention to violate the Ontario Temperance Act, 1916, 6 Geo. V. ch. 50, and the onus had not been displaced.
- (3) That sec. 70 of the Act applied, for the liquor was found in Ontario, in the circumstances mentioned in sub-sec. 9, and the magistrate had jurisdiction to enter upon the inquiry, and all the provisions of the Act applied until it was proved that the transaction was one to which the Act did not apply.

MOTION by Louis Renaud for an order quashing an order made by the Police Magistrate for the Town of North Bay directing the confiscation of a quantity of intoxicating liquor found in a railway car in the town.

November 12. The motion was heard by MIDDLETON, J., in Chambers.

James Haverson, K.C., for the applicant.

J. R. Cartwright, K.C., for the Crown.

December 9. MIDDLETON, J.:—An accident happened a railway car said to contain "mixed pickles," at North Bay, which revealed the fact that under this name and brand was concealed, in 133 barrels weighing 13 tons, a large quantity of bottled liquor said to be worth \$10,000.

Section 70 of the Ontario Temperance Act, 1916, 6 Geo. V. ch. 50, provides: "Where an inspector . . . finds liquor in transit . . . upon the premises of any railway company . . . and believes that such liquor is to be sold or kept for sale in contravention of this Act, he may forthwith seize and remove the same . . ."

The section then proceeds to provide for the condemnation of the liquor by summary proceedings before a Justice; and sub-sec. 6 provides that, at the hearing, "any person who claims that the liquor is his property and that the same is not intended to be sold or kept for sale in violation of this Act may appear and give evidence . . .," which the magistrate may hear and deal with as upon the trial of a complaint under the Act. If no person claims to be the owner, or "if the Justice disallows such claim," and finds that the liquor was intended to be sold or kept for sale in violation of the Act, he may declare it forfeited to His Majesty (sub-sec. 7). If the "claim of any person to be the owner of the liquor is established," and "it does not appear that it was intended to sell or keep the liquor in contravention of the Act," the liquor may be "restored to the owner" (sub-sec. 8).

The statute further provides, by sub-sec. 9, that if it appears that the liquor was consigned to some person in a fictitious name or was shipped as other goods, or was covered or concealed in such a way as to make discovery of its true nature difficult, "it shall be *prima facie* evidence that the liquor was intended to be sold or kept for sale in contravention of this Act."

At the hearing the case for the Crown was complete as soon as it was shewn that this liquor was in the possession of the railway company at North Bay disguised as mixed pickles.

Mr. Haverson appeared "for the person who is claiming the liquor," but this person was not named, nor was there any evidence whatever as to ownership. This course may have been prudent, as the provisions of the Act are somewhat drastic in their operation upon the person of the offender.

On this motion the applicant is said to be Louis Renaud, but there is no affidavit by him nor any indication that he has any title to the liquor—nor that any such person exists.

At the hearing, a way-bill of the railway company was produced, shewing the Canada Vinegar Works, of Montreal, as the consignors,

Middleton, J.
1918
RE
ONTARIO
TEMPERANCE
ACT.
RENAUD'S
APPLICA-
TION.

Middleton, J.
 1918
 RE
 ONTARIO
 TEMPERANCE
 ACT
 RENAUD'S
 APPLICATION.

and W. J. McKenzie & Co. Limited, of Winnipeg, as the consignees.
 The bill of lading of the goods is not produced.

Renaud is neither consignor nor consignee, and does not appear to have any claim.

The consignees by their counsel disclaimed before the magistrate any knowledge of the transaction and offered to produce evidence if desired.

Mr. Haverson admits that the names of the consignors and the consignees, both concerns of high repute, were used without their knowledge to lend colour to the shipment of so large a quantity of pickles. How these "pickles" were to be ultimately dealt with is not even suggested. Renaud's cross-examination might have been of considerable interest—if indeed he is the author of the venture.

Mr. Haverson's argument is that, "as the liquor was shipped in Quebec for Manitoba, the moment this appeared the magistrate's jurisdiction was gone," and as a consequence the liquor must be either handed over to the railway company to continue its journey to its uncertain fate or must be handed over to Renaud. Handing to the owner seems to be the only thing the statute contemplates as an alternative to condemnation.

The statute, being of Provincial origin, can only have a Provincial effect, and does not render illegal the carrying by the railway of liquor from Quebec to Manitoba; nor does the fact that the liquor was intended to be kept and sold contrary to the provisions of the Manitoba statute make any difference.

But the difficulty is that there is no evidence to shew that it was not intended to keep and sell this liquor in Ontario.

The way-bill, false in all else, cannot be regarded as conclusive in respect to the place of shipment and destination; and it by no means follows that Winnipeg was intended to be the ultimate destination. No doubt, McKenzie & Co. would have rejected the "pickles" they had not bought, and then instructions would have been sent to the railway company to re-ship, and this might well be to some place in Ontario.

In my view, the motion fails, for two reasons:—

(1) The applicant is not shewn to be the owner, and so has no *locus standi*.

(2) The facts shewn, quite apart from the statutory provision

of sub-sec. 9, are enough to indicate an intention to violate the Act (and more than enough if that section applies), and the onus has not been displaced.

In my view the section applies, for the liquor was found in Ontario, and the magistrate had jurisdiction to enter into the inquiry under the Act, and all its provisions apply until it is proved that the transaction is one to which the Act does not apply.

The motion must be dismissed with costs.

Middleton, J.

1918

RE

ONTARIO
TEMPERANCE
ACT.

RENAUD'S
APPLICA-
TION.

[APPELLATE DIVISION.]

1918

HOEHN V. MARSHALL.

July 2.
Dec. 10.

Mortgage—Power of Sale—Short Forms of Mortgages Act—Power in Statutory Form—Additional Power—Reference to Statutory Power—Right of Assignee of Mortgagee to Exercise Additional Power—Action by Executor of Mortgagor to Set aside Sale and Conveyance under Power—Sale Made in Good Faith and without Collusion—Inadequacy of Price—Sale at Undervalue—Effect of—Dismissal of Action—Unfounded Charges of Fraud—Costs.

A mortgage, purporting to be made under the Short Forms of Mortgages Act, contained a power of sale in the statutory short form—that the “mortgagee on default of payment for two months may on one month’s notice enter on and lease or sell the said lands”—with the addition “that in case of default of payment as in foregoing provision mentioned for three months, the foregoing powers of entry, leasing, and sale, or any of them, may be exercised without any notice having been given as therein provided.”—

Held, that not only the mortgagee, but her assignee, could validly exercise the power of sale upon three months’ default without notice.

Barry v. Anderson (1891), 18 A.R. 247, followed.

And *held*, upon the evidence, that the sale and conveyance of the land in question in this action by C.M., the assignee of the mortgagee, to R., and the mortgage by R. to L., which sale and conveyance and mortgage were attacked by the executor of the mortgagor, were made in good faith and without collusion.

The only possible ground for impeaching the sale to R. was inadequacy of price; but the inadequacy was not so great as to lead to the presumption of fraud or negligence or unfaithfulness of C.M. in the discharge of her duty in the exercise of the power of sale.

Warner v. Jacob (1882), 20 Ch.D. 220, and *Chatfield v. Cunningham* (1892), 23 O.R. 153, approved and followed.

Latch v. Furlong (1866), 12 Gr. 303, distinguished.

The action was dismissed, and the plaintiff, who had made charges of fraud against the defendants, was required to pay their costs.

ACTION by Marcel Hoehn, executor of James Marshall, deceased, to set aside, as fraudulent and void, a conveyance of land to the defendant Rylands, made by the defendant Catharine Marshall, in exercise of a power of sale contained in a mortgage made by

1918
HOEHN
v.
MARSHALL.

James Marshall to one McMartin, and by McMartin assigned to Catharine Marshall, and also to set aside a mortgage made by the defendant Rylands to the defendant Logie.

The action was tried by FALCONBRIDGE, C.J., K.B., without a jury, at London.

Sir George Gibbons, K.C., and P. H. Bartlett, for the plaintiff.

J. M. McEvoy, for the defendants Rylands, Logie, and Alice Marshall.

R. G. Fisher, for the defendant Catharine Marshall.

July 2. FALCONBRIDGE, C.J., K.B.:—Whenever there is any conflict of testimony between witnesses for the plaintiff and those of the defendant, I accept the statement of the former class.

The executor had a *bonâ fide* offer of \$1,000 for the property from Haskett, and this was communicated to the solicitor who was assuming to exercise the power of sale, and who nevertheless went on and sold for \$650—enough to cover the amount due on the mortgage and on a small judgment for dower in favour of the testator's widow, the defendant Catharine Marshall.

In exercising a power of sale a mortgagee may not be exactly a trustee for the mortgagor, but he owes him some duty, which was sharelessly disregarded in this case. There were suspicious circumstances about the transaction—the assignment of the mortgage to Catharine Marshall, a poor coloured woman living in Detroit—the advance of the necessary money by the solicitor's cheque—the presence of the said poor woman in London to execute the deed to Rylands, the purchaser—and the way in which the purchase-money was made up; but there is not enough herein to justify me in finding the defendants Rylands and Logie to have been parties to a conspiracy to cut out the executor; and, therefore, I do not award costs against them.

There will be judgment for redemption against Rylands and Logie, on payment of \$650 with interest from the 5th January, 1917. I give them interest because the executor's solicitors were so hopelessly supine in their conduct as to have invited what actually took place. There will be no costs for or against Rylands and Logie—and it would be a mere matter of form to award costs against the defendants the Marshalls.

The plaintiff may amend the statement of claim so as to pray the relief which I grant.

The defendants appealed from the judgment of FALCONBRIDGE, C.J.K.B.

Falconbridge,
C.J.K.B.

1918

HOEHN
v.
MARSHALL.

November 29. The appeals were heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

J. M. McEvoy, for the appellants Rylands, Logie, and Alice Marshall, argued that neither the deed from Catharine Marshall to Rylands, nor the mortgage from Rylands to Logie, should be set aside, nor should the plaintiff be allowed to redeem. There had been no conspiracy or collusion amongst Catharine Marshall, Alice Marshall, and Rylands to cut out the executor. Rylands was a *bonâ fide* purchaser for value without notice, and the sale had not been at an undervalue at all, let alone such a gross undervalue as to justify setting aside a deed: *Chatfield v. Cunningham* (1892), 23 O.R. 153; *Warner v. Jacob* (1882), 20 Ch.D. 220. Counsel contended, upon the authority of *Barry v. Anderson* (1891), 18 A.R. 247, that Catharine Marshall, as assignee of the mortgage, had the same right to exercise the power of sale as the mortgagee.

The defendant Catharine Marshall was not represented.

P. H. Bartlett, for the plaintiff, respondent, argued that the power of sale under which the sale was made to Rylands could not be validly exercised by the assignee of the mortgage: *Re Gilchrist and Island* (1886), 11 O.R. 537. The sale, in any event, from Catharine Marshall to Rylands, was not *bonâ fide*, but was the result of collusion and conspiracy between these two and Alice Marshall, and was engineered in order to cut out the executor. The inadequacy of price was evidence of collusion, and was sufficient to warrant the sale being set aside: *Latch v. Furlong* (1866), 12 Gr. 303.

McEvoy, in reply.

December 10. MULOCK, C.J. Ex.:—These are three separate appeals by the defendants against the judgment of the Chief Justice of the King's Bench, who tried the case.

The action was brought by Marcel Hoehn, executor of James Marshall, deceased, to set aside, as fraudulent and void, a convey-

App. Div.
1918
HOEHN
v.
MARSHALL.
Mulock, C.J.Ex.

ance of certain lands in the city of London to the defendant Rylands, made by Catharine Marshall, in exercise of a power of sale contained in a mortgage made by the said James Marshall to one Martha McMartin, and by the latter assigned to Catharine Marshall, and also to set aside a mortgage made by the said Rylands to one Elizabeth Logie.

The Chief Justice declared the plaintiff entitled to redeem on payment of the moneys owing on the mortgage to Elizabeth Logie, and these appeals are from that judgment.

The notes of evidence contain much irrelevant matter. The only facts which appear to me material to the issue are the following:—

James Marshall owned certain lands in the city of London, and, by deed bearing date the 14th December, 1914, made in pursuance of the Short Forms of Mortgages Act, conveyed the same by way of mortgage to one Martha McMartin for the purpose of securing payment of \$285.75 with interest at 6 per centum per annum, the principal being payable in 12 equal semi-annual payments; and the mortgage contained the privilege to the mortgagor and his assigns of paying off the whole or any part of the mortgage-moneys when paying an instalment of principal.

Catharine Marshall, wife of the said James Marshall, did not bar her dower in the mortgaged lands.

The mortgage to Martha McMartin contained the following power of sale:—

“Provided that the said mortgagee on default of payment for two months may on one month’s notice enter on and lease or sell the said lands: provided that in case of default of payment as in foregoing proviso mentioned for three months, the foregoing powers of entry, leasing, and sale, or any of them, may be exercised without any notice having been given as therein provided.”

James Marshall died, and by his will devised his whole estate to the defendant Alice Marshall. Thereupon Catharine Marshall, the widow, brought an action against Alice Marshall, devisee in possession, claiming dower in the mortgaged lands, and that action was settled by a consent judgment which awarded Catharine Marshall \$140, being the agreed value of her dower, and \$87.65 costs.

The plaintiff, as executor of the deceased James Marshall, for

the purpose of meeting debts of the testator, desired to sell the lands, and twice offered them for sale by public auction, but each attempted sale proved abortive. Meantime, the judgment of Catharine Marshall remaining unsatisfied, her solicitors desired to acquire control of the McMartin mortgage with a view to selling the mortgaged lands and realising therefrom enough to pay off the mortgage-debt and the judgment for dower. On the 30th December, 1916, Catharine Marshall's solicitors paid to Martha McMartin the amount owing on her mortgage, and she thereupon assigned the mortgage to Catharine Marshall. Alice Marshall was still in possession of the mortgaged lands; and, having learned that Catharine Marshall, through her solicitors, intended to sell the property under the mortgage, she (Alice) agreed with the defendant Rylands that if he would purchase the property and rent it to her she would attorn to him as a monthly tenant. Rylands then saw Catharine Marshall's solicitors and offered to purchase the property for \$650. This offer was accepted and carried into effect. Rylands, through his solicitor, Mr. Winnett, on the 6th January, 1917, paid to Catharine Marshall's solicitors the sum of \$650, and, by deed bearing date the 5th January, 1917, Catharine Marshall then conveyed to him the mortgaged lands.

The recitals in this deed shew that it was made by Catharine Marshall as assignee of the McMartin mortgage and by virtue of the power of sale contained therein. Rylands borrowed \$500, part of the purchase-money, from the defendant Elizabeth Logie, giving her in security a mortgage on the lands in question and certain other lands owned by him. The deed from Catharine Marshall was duly registered in the proper registry office on the 6th January, 1917, at the hour of 21 minutes past 10 in the forenoon, and the mortgage from him to Elizabeth Logie was registered in the said office one minute thereafter.

In the amended statement of claim the plaintiff alleges "that the sale to the said Rylands was collusive and fictitious and that no moneys passed between the said Rylands and the defendant Catharine Marshall but that the sale was made or was intended to be made to one Alice Marshall, the added defendant . . . that the said Catharine Marshall knew, either personally or through her solicitors, that the said sale to the said Rylands was fraudulent and collusive and was made at an undervalue and for the purpose

App. Div.
1918
HOEHN
v.
MARSHALL.
Mulock, C.J.Ex.

App. Div.
1918

HOEHN
v.

MARSHALL.

Mulock, C.J.Ex.

of defrauding the executor and the creditors of the estate of the said James Marshall . . . that the defendant William S. Rylands and the added defendant Alice E. Marshall entered into an agreement whereby the said lands were nominally conveyed to the said William S. Rylands, but were really and in fact conveyed to the said William S. Rylands in trust for and for the benefit of the said added defendant Alice E. Marshall," etc.

The plaintiff also charges that, when Elizabeth Logie advanced to Rylands the \$500 and received from him the mortgage in security therefor, she "well knew that the said sale to her co-defendant was made collusively and fraudulently and at an undervalue, and the said money was advanced by her for the purpose of carrying out the said fraud and enabling the said sale to be effected."

The learned trial Judge does not find fraud, but says that, whilst "there were suspicious circumstances about the transaction . . . there is not enough herein to justify me in finding the defendants Rylands and Logie to have been parties to a conspiracy to cut out the executor;" and he directs redemption against Rylands and Logie without costs.

If the finding of the learned Chief Justice means that there was an absence of fraud on the part of Rylands and Elizabeth Logie, I agree with him. I have carefully studied the evidence and fail to discover in it any evidence casting any doubt on the *bona fides* of the sale to Rylands and the mortgage from him to Elizabeth Logie. In making an order for redemption, the learned Chief Justice in fact sets aside the deed to Rylands, apparently upon the ground that the sale to him was made at an undervalue, and the case narrows itself down to the one point—whether the sale to Rylands was at such an undervalue as to amount to a fraud on those entitled to redeem the McMartin mortgage and to deprive the Rylands purchase of the character of a *bonâ fide* purchase for value without notice.

The learned Chief Justice finds that the plaintiff had a *bonâ fide* offer of \$1,000 for the property, and communicated that fact to Catharine Marshall's solicitor, shortly before he, on her behalf, sold the property to the plaintiff for \$650; but there is no evidence that Rylands knew of this offer. At the trial there was evidence of value. Mr. Tull valued the property at \$650; Mr. Winnett

at \$700; Mr. Carey at between \$600 and \$700; Mr. Walsh at \$770; Mr. Haskett at \$1,000; Mr. Sinclair at \$1,220; Mr. Wilson at \$1,200.

The plaintiff in his affidavit on application for probate gave the value as \$800. In June, 1917, when examined for discovery, he valued it at \$1,000, and at the trial at \$1,200. Sinclair's and Walsh's valuations had reference apparently to the time of the trial; and, as the evidence of the plaintiff shews that the property had increased in value \$400 since December, 1916, it would be necessary to reduce by that amount the valuations of Sinclair and Walsh. Apparently the property was rising in value and was not worth as much in January, 1917, as later.

The evidence shews that, when Rylands was negotiating to purchase, it might be difficult for him to obtain possession as against Alice Marshall; and, therefore, he was unwilling to purchase, and only agreed to do so after an arrangement was come to with Alice Marshall whereby, he agreeing to let her remain in possession as his tenant, she agreed to attorn to him. Twice before the sale to Rylands, the executor had offered the property for sale by public auction, but each attempted sale proved abortive. On the second sale, namely, in December, 1916, Alice Marshall attended and objected to it. She was devisee in possession, and apparently was determined to retain possession, and had recently instituted legal proceedings and had registered a *lis pendens* against the property. Her attitude was sufficient to dampen any sale, and it was to the advantage of those entitled to redeem that her opposition be removed if not at too great a cost; and I think that the arrangement effected by Catharine Marshall's solicitor whereby Alice Marshall became a consenting party to the sale, which resulted in the net sum of \$650 being realised, was, from the standpoint of those entitled to redeem, a wise one. When Haskett made his offer of \$1,000, the *lis pendens* referred to was on record. Doubtless he would have required its removal. This might have proved a tedious and expensive matter to the vendor; so that it does not follow that his offer would have netted to the vendor the full sum of \$1,000.

The value of real estate is largely a matter of opinion, and a buyer naturally takes a conservative view of the value of what he contemplates purchasing. Even if the property in question was

App. Div.
1918
HOEHN
v.
MARSHALL.
Mulock, C.J.Ex.

App. Div.
1918
HOEHN
v.
MARSHALL.
Mulock, C.J.Ex.

worth \$200 or \$300 above the price at which Rylands was purchasing it, one would not be justified in assuming that he considered he was making other than a fair purchase.

The only possible ground for impeaching the sale is inadequacy of price, but inadequacy is a matter of degree. Mere inadequacy is not sufficient; it must be so gross as to lead to the presumption of fraud. That is, the inadequacy must be so great as to lead the purchaser to the conclusion that the mortgagee is negligent or unfaithful in the discharge of his duty, which is to bring the property to the hammer under every possible advantage to his *cestui que trust*: *Downes v. Grazebrook* (1817), 3 Mer. 200, 205; *Chatfield v. Cunningham*, 23 O.R. 153, 166; *Warner v. Jacob*, 20 Ch. D. 220.

The plaintiff's counsel relied on *Latch v. Furlong*, 12 Gr. 303, but the decision in that case did not turn wholly on inadequacy of price. The mortgagee made no effort to obtain the fair value of the property, and informed the Sheriff and the purchaser's agent that "all he wanted was to get the money due him, and he would let the property go." Thus the purchaser was aware that the mortgagee was failing in his duty towards his *cestui que trust*. There is nothing of this nature in the present case. Rylands had no reason to believe that the property was not being fairly sold.

The plaintiff's counsel also contended that the mortgagee only, and not Catharine Marshall, her assignee, was entitled to exercise the power of sale contained in the mortgage. This point is concluded by *Barry v. Anderson*, 18 A.R. 247, in which it was held that the assigns of the mortgagee could validly exercise the power of sale contained in the assigned mortgage.

Further, it may be that the prior registration of the deed to Rylands may protect Elizabeth Logie in respect of her subsequently registered mortgage.

Further, there is no evidence impeaching her *bona fides* in respect of her mortgage, and she is entitled to maintain it, and also to have maintained the foundation upon which it rests, namely, the deed to her mortgagor, Rylands. In view, however, of the conclusion which I have reached as to the validity of the deed itself, it is not necessary to refer further to the mortgage to Elizabeth Logie.

For these reasons, I think the judgment appealed from should be set aside with costs and the action dismissed. Inasmuch as

the plaintiff in his statement of claim has made charges of fraud against the defendants, they are entitled to the costs of the action.

CLUTE, RIDDELL, and SUTHERLAND, JJ., agreed with MULOCK, C.J. Ex.

App. Div.
1918

HOEHN
v.
MARSHALL.

Mulock, C.J. Ex.

KELLY, J.:—The following facts are taken from the evidence of the plaintiff's witnesses:—

On the 14th October, 1914, a mortgage was made by James Marshall, since deceased, to Martha McMartin, for \$285.75; on the 30th December, 1916, this mortgage was assigned by the mortgagee to the defendant Catharine Marshall.

On the 5th January, 1917, a conveyance, purporting to be under the power of sale contained in the mortgage, was made of the mortgaged property by Catharine Marshall to the defendant Rylands for the expressed consideration of \$650; and on the same day a mortgage was made by Rylands, the purchaser, to the defendant Elizabeth Logie for \$500, upon this same property and other property of the mortgagor; the sale was completed on the 6th January, 1917, and the deed to Rylands and the mortgage to Elizabeth Logie were on that day registered, the registration of the mortgage following immediately upon that of the deed.

The defendant Catharine Marshall, who resided in Detroit, was the wife of the above mentioned James Marshall, who resided in London, where the property mortgaged to McMartin is situate. Alice Marshall resided with James Marshall, and by his will he made her his sole devisee. In an action for dower by Catharine Marshall, after James Marshall's decease, a settlement was arrived at by which it was agreed that Catharine Marshall should be paid \$140 and \$87.65 costs, and judgment was entered accordingly, and, it is said, was registered against the property.

The plaintiff, Marcel Hoehn, is the executor of the will of James Marshall.

About September, 1916, the executor made an abortive attempt to sell the property, there being other debts, as well as the mortgage, due by the testator, but the sale, it has been sworn to, was interfered with by the defendant Alice Marshall, who was in actual possession of the property. An application afterwards made to the Court for an order for administration was refused.

App. Div.
1918
HOEHN
v.
MARSHALL.
Kelly, J.

A second attempted sale by auction by the executor, on the 2nd January, 1917, was also abortive, there being no bids, except by the auctioneer and the defendant Alice Marshall, who, it was conceded, was without means and altogether unable to carry out any purchase she might undertake to enter into.

The sale to Rylands and the mortgage to Elizabeth Logie are attacked chiefly on the ground of fraud in making the sale, the allegations being that there was collusion or a conspiracy amongst Catharine Marshall, Alice Marshall, and the purchaser and his mortgagee, and that the selling price was greatly below the value of the property. The learned trial Judge finds that there were suspicious circumstances about the transaction, but that there is not enough to justify him in finding the defendants Rylands and Logie to have been parties to a conspiracy to cut out the executor. Judgment was given for redemption as against the defendants Rylands and Logie, upon payment of \$650 and interest from the 5th January, 1917, but without costs, and directing that, on payment of that sum, Elizabeth Logie "do execute a discharge of the said mortgage to the plaintiff in this action." The defendants Rylands, Logie, and Alice Marshall have appealed; Catharine Marshall also gave notice of appeal, but was not represented on the argument.

All the evidence at the trial, except on the question of value of the property, was by witnesses called by the plaintiff. There was evidence that on the 2nd January—the day of the second abortive attempt at sale—the plaintiff's solicitor had a verbal offer of \$1,000 for the property from one Haskett, and in the reasons for judgment there is a finding that the executor had this *bonâ fide* offer, and that this was communicated to the solicitor who was assuming to exercise the power of sale, and who did carry through the sale at \$650.

The trial Judge's finding, exonerating the defendants Rylands and Logie from the charge of being parties to a conspiracy to cut out the executor, is, I take it, intended to mean that they were innocent of any such complicity in the transaction as would deprive them of the advantage resulting to one in the position of an innocent purchaser for value. There is ample evidence to justify the finding in respect to the absence of such complicity on the part of these two defendants. The theory is advanced that Rylands was merely acting

in the purchase as agent or representative of Alice Marshall. It is manifest that he was desirous of assisting Alice Marshall, whom he had known for several years, and who had, off and on, worked in his house. She was in possession of the property, and had made claim to ownership thereof; a sale under the mortgage or under the judgment for dower to a stranger would endanger her chances of remaining in possession. If a purchase were made by one friendly to her, her chance of remaining in possession would naturally be improved; and so she approached Rylands, who then saw Mr. Winnett, her solicitor, in the belief that he (Winnett) was about to sell the property; the latter's answer was that he had nothing to do with it, and that he (Rylands) would have to see Mr. Toothe, and that he could make his own deal, Mr. Toothe being of the firm of solicitors representing Catharine Marshall in making the sale.

Tooth was apparently not friendly to Alice Marshall, and that there was any communication between Winnett and Tooth in respect of Rylands going to the latter's office is denied. The course pursued by Rylands would indicate that in arranging the details of the purchase he exercised just such reasonable care as one would expect from an ordinary purchaser buying for himself. He protected himself against Alice Marshall's possession (which was evidently adverse) by procuring from her a written document declaring her position not as one having any right to possession, founded on a claim of ownership, but as his tenant at a rental which she thereafter paid to his solicitor for him.

When the trial came on, Rylands was overseas in military service, and his evidence was not obtained. Alice Marshall was called for the plaintiff, and in her examination in chief she has this to say, in respect to Rylands purchasing:—

“Q. Mr. Rylands told you that if he could buy the property you would be the first one to have the chance to buy it, didn't he?
A. Yes.

“Q. Did Rylands tell you that you would be the first person that could buy in the property? A. Mr. Rylands told me he would give me the first chance to buy it, that I could have the property back.

“Q. That is what he said? A. I beg your pardon?

“Q. That you could have the property back, the first person to buy it. A. Yes.

App. Div.
1918
HOEHN
v.
MARSHALL.
Kelly, J.

App. Div.
1918
HOEHN
v.
MARSHALL.
Kelly, J.

"Q. At what he paid for it? A. I don't know, he never said what he paid for it; I did not say what he paid for it or for the same amount.

"Q. You were going to keep possession of the property and you were going to get it back and have the first chance? A. Yes.

"His Lordship: He did not say the price? A. No, no price mentioned.

"Mr. Bartlett: He told you what he had paid for it? A. I knew what he paid for it.

"Q. Did Mr. Winnett tell you that the property was going to be sold and you had better get some friend to go and buy it for you? A. I went to him and he said it was going to be sold, and so I went to see a friend of mine.

"Q. To buy it for you? A. Yes.

"Q. Who was the friend? A. Mr. Rylands, the man I worked for.

"Q. And he was buying it for you, was not he? A. He had taken it over.

"Q. He was buying it for you? A. No, not as I know of.

"Q. Why did it make any difference to you whether he was a friend of yours or not? A. He had taken it over and I had worked for him.

"Q. He was a friend of yours? A. He was a friend and I worked for him.

"Q. That is why you took him up there? A. Yes, I told him to take it over, to go up and see Mr. Winnett because they were going to sell it, and I was going to be put outdoors.

"Q. For you? A. Yes."

And on cross-examination:—

"Q. And he took it over? A. Yes.

"Q. And you have been paying rent for it ever since? A. Yes.

"Q. You don't know what price he will charge you when you come to buy it back? A. No."

The objection that the power of sale under which the sale was made to Rylands could not be validly exercised by the assignee of the mortgage, is met by authority. Admittedly it was without formal notice to those entitled to or interested in the equity of redemption. The mortgage was made expressly in pursuance of the Short Forms of Mortgages Act, the power of sale being in these words:—

"Provided that the said mortgagee on default of payment for two months may on one month's notice enter on and lease or sell the said lands: provided that in case of default of payment as in foregoing proviso mentioned for three months, the foregoing powers of entry, leasing, and sale, or any of them, may be exercised without any notice having been given as therein provided."

The first of these follows the form in the Act, and no objection was taken to it in that respect; but it was urged that the additional form is such as to make it purely personal to and exercisable only by the mortgagee, and not by the assignee. Had the latter form stood alone without such reference to the preceding statutory power as made the terms of the latter apply to it (so far as they could be made applicable), there would have been good ground for the plaintiff's objection. The default mentioned in the latter of the two powers is "default of payment as in foregoing proviso," and the powers which on such default were to become exercisable without notice were "the foregoing powers of entry, leasing, and sale or any of them," and which, by reference to column 2 of schedule B. of the Short Forms of Mortgages Act, R.S.O. 1914, ch. 117, are found to be exercisable by the mortgagee, his (or her) heirs, executors, administrators, or assigns.

The case is not within the authority of *Re Gilchrist and Island*, 11 O.R. 537, but nearly resembles in its facts *Barry v. Anderson*, 18 A.R. 247. There the provisions as to sale were: "Provided that the said mortgagees, on default of payment for one month, may, on ten days' notice, enter on and lease or sell the said lands. And provided also that in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said power of sale and entry may be acted upon without any notice." The decision by three of the four Judges who composed the Court was that the power of sale could be validly exercised by the assigns of the mortgagees.

Osler, J.A., in his reasons, said, referring to the latter of the two clauses (that which provides for sale without notice):—

"This clause is to be read just as if the previous clause had been set forth in its extended form, since that clause is, as I hold, in exact compliance with the Act, and is therefore to be construed as if it had been in the form of words in column 2 of the schedule, the extended form. Reading the second clause as following the

App. Div.
1918

HOEHN
v.
MARSHALL,
Kelly, J.

App. Div.
1918
HOEHN
v.
MARSHALL.
Kelly, J.

extension it declares that, in the event it provides for, the said power of sale and entry may be acted upon without notice. All the terms of that power, therefore, except as varied by the terms of the 2nd clause, are brought into that clause by relation, and among those terms is the provision that it may be exercised by the heirs, executors, administrators or assigns of the mortgagee."

And Maclellan, J.A., with whom Hagarty, C.J.O., agreed, said:—

"The power here is the short form, prescribed by the statute, on default of payment for a month and ten days' notice, with this addition: 'And provided also that in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said power of sale and entry may be acted upon without any notice.' When this is read with the preceding proviso in its extended form, I think it plainly enables the same persons to exercise the power in the one case as in the other."

There is a further question, whether, in the manner in which the sale was conducted, the assignee of the mortgage committed any breach of a duty which, as holder of the mortgage, she owed to those beneficially interested in the equity of redemption. Whether there was such a breach of duty does not, in view of the finding of the trial Judge, and in the light of the evidence to which I have already referred, affect the position of the defendants Rylands and Logie, whose title, as far as the part they took in the transaction is concerned, remains unimpaired.

In his reasons for judgment, the learned trial Judge says, referring to the duty of a mortgagee to a mortgagor when exercising a power of sale, that that duty was shamelessly disregarded in the present case. He also says that the executor's solicitors were so hopelessly supine in their conduct as to have invited what actually took place. This latter finding, to my mind, very materially affects the situation with relation to what is the proper inference to be drawn from the two findings, and the evidence applicable thereto. Catharine Marshall had a judgment in her favour, chargeable against the land, which was allowed to remain unpaid for a considerable time, and with no prospect in sight of immediate payment. Attempted sales of the property were abortive, at one of which at least there was interference by Alice Marshall, who

was in possession, and who also claimed ownership of the property. Such an occurrence would certainly tend, not only to deter persons from purchasing, but also to depreciate the value to an intending purchaser; and so the prospects of payment of the judgment from moneys derived from that source were lessened. There was nothing illegal in Catharine Marshall's procuring, through her solicitor, the assignment of the mortgage, even though the money were advanced for the time being by the solicitor. She had the legal right to make sale under the powers in the mortgage without notice. The matter then comes down to whether, in the events which happened, the sale was effected with proper discretion, and not at a fraudulent undervalue—for, if it were made under these latter conditions, it would be open to successful attack. The Court will not interfere merely on the ground that the sale is disadvantageous unless the price is so low as in itself to be evidence of fraud: *Warner v. Jacob*, 20 Ch.D. 220; *Colson v. Williams* (1889), 58 L.J.Ch. 539, 61 L.T.R. 71.

A mortgagee has his own interest to consider as well as that of the mortgagor, and his duty is to keep within the terms of the power, to exercise the power *bonâ fide* for the purpose of realising the security, and to take reasonable precaution to secure a proper price; and the Court will not inquire whether he was actuated by any other motive: Halsbury's Laws of England, vol. 21, para. 450, p. 254.

Taking the evidence of the solicitor, who, on the 2nd January, 1917 (the day of the second attempted sale), was acting for the executor (the plaintiff), what then happened was this: Within half an hour after the attempted sale, the vendor's solicitor (Mr. Toothe) called him up by 'phone, and he told Mr. Toothe that the property not having reached the reserve bid, it had been withdrawn from sale, and that he had an offer of \$1,000 for it; Mr. Toothe then told him they were going to sell under the power in the mortgage for \$650, which he thought was enough for it. There is no evidence that Toothe was told who the person was who is said to have made the \$1,000 offer, and the executor's solicitor admits that he did not offer to pay the mortgage, though Mr. Toothe said at the time that he was going to sell and would not wait, and there is no evidence that any person on behalf of the executor then took any steps to carry out an acceptance of the \$1,000 offer, or to satisfy the debts or either of them, held by

App. Div.
1918

HOEHN
v.
MARSHALL.
Kelly, J.

App. Div.
1918
HOEHN
v.
MARSHALL.
Kelly, J.

Catharine Marshall; while the executor's solicitor admits also in evidence that not only was he warned on the 2nd that the property was to be sold under the mortgage, but also that on the 5th Mr. Toothe wrote to him that he was going to sell.

On the question of value there is evidence of several witnesses on each side. The learned trial Judge accepts the statements of the plaintiff's witnesses as against those of the defendants' witnesses where there is a conflict between them. In determining whether the sale was at a gross under-price, the knowledge possessed by the vendor is not to be overlooked. In the inventory filed by the executor on application for probate, the value of this property was put at \$800. Catharine Marshall's solicitor personally examined the property, and states that he believed then that it was worth not much in excess of the selling price; and, as an element affecting the value for selling purposes, there was the fact that Alice Marshall was holding possession against the executor, and claiming to be entitled to ownership; the vendor's solicitor swears that he considered the price was a fair one if a purchaser could be gotten to take the possession of Alice Marshall—that is, to accept the property while she remained in possession.

The opinions of those who were called to give evidence of value differ materially, and it is not made clear just when some of them made their valuations. Considering all the circumstances at and leading up to the time of the sale, I have come to the conclusion, with the greatest respect for the opinion of the learned trial Judge, that the selling price was not so low as in itself to be evidence of fraud.

I am of the opinion that the appeals must succeed with costs.

On the argument the appellants' counsel stated that the defendants Rylands and Logie, notwithstanding that they claimed to be entitled to succeed, were not insisting on retaining the property, provided they were repaid their money with interest and costs. While this Court has nothing to do with that suggestion, it occurs to me that if these defendants are still of the same mind, there is an opportunity for the plaintiff to recover back the property and realise something from the equity if it is now as valuable as he claims it is.

Appeals allowed.

[APPELLATE DIVISION.]

1918

HICKMAN v. WARMAN.

Dec. 10.

Vendor and Purchaser—Agreement for Sale of House and Lot Described by Street Number—Conveyance by Deed under Short Forms of Conveyances Act—Land Conveyed as West Half of Lot according to Plan—House Encroaching 4 Feet on East Half—Mutual Mistake—Rectification of Deed—Impossibility of, because Title to East Half in Stranger—Damages in Lieu of Specific Performance—Judicature Act, sec. 18—Intention of Purchaser—Admissibility of Oral Evidence of Circumstances—Breach of Covenant for Right to Convey—Assessment of Damages—Cost of Removal of House.

The defendant agreed to sell and the plaintiff to buy—as expressed in the written agreement—"house and lot known as No. 144 north side of Glenwood avenue, city of Toronto." Both parties believed that the land upon which the house stood was the west half of lot 82 according to a registered plan; the defendant had owned the whole lot, but had conveyed the east half to another; and the defendant, by a deed made in pursuance of the Short Forms of Conveyances Act, conveyed the west half to the plaintiff. It turned out that the house encroached 4 feet on the east half; and, when the plaintiff discovered this, he moved the house upon the west half. Fraud was not alleged against the defendant:—

Held, that the plaintiff's right (by reason of the mutual mistake) was to have the deed rectified to conform with the agreement; but, as that could not be done because the title to the east half was no longer in the defendant, the plaintiff should have damages (Judicature Act, R.S.O. 1914, ch. 56, sec. 18); and the sum which the plaintiff expended in removing the house was awarded to him as damages.

Per RIDDELL, J.:—It was the intention of the plaintiff to buy the house as a dwelling; that intention was known to the defendant; and it was plain from all the circumstances of the case that the land was not of importance except as being the lot upon which the house was built and by which it was surrounded. The deed not being in accordance with the written agreement, parol evidence with respect to prior relevant transactions was admissible. The plaintiff was entitled to damages for breach of the defendant's covenant in the deed that he had the right to convey (covenant 2, in the Short Forms of Conveyances Act, R.S.O. 1914, ch. 115).

APPEAL by the plaintiff from the judgment of DENTON, Jun. Co. C.J., dismissing an action, brought in the County Court of the County of York, to recover damages for breach of a contract or covenant.

On the 12th June, 1913, the plaintiff entered into an agreement with the defendant to purchase a "house and lot known as No. 144 north side of Glenwood avenue, city of Toronto." The defendant produced to the plaintiff, before the agreement was signed, a surveyor's plan of the land. Both parties believed—but were mistaken—that the survey was correct; and, relying upon the plan, the defendant in 1913 conveyed to the plaintiff by deed, containing the usual covenants, the west half of lot 82 on the north side of Glenwood avenue, as shewn on the plan. By a subsequent survey

App. Div.
1918

HICKMAN
v.
WARMAN.

it appeared that house No. 144 was so built as to encroach 4 feet on the next lot to the west of 82. The owner of the next lot offered to sell the plaintiff 4 feet, but the plaintiff preferred to remove his house, and did so, at an expense of \$125.

The learned trial Judge was of opinion that the plaintiff could not succeed upon his claim for damages for breach of the contract or covenant, and dismissed the action.

October 25. The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

A. J. Russell Snow, K.C., for the plaintiff, appellant, argued that the defendant sold the plaintiff the house and lot known as No. 144, which should include the land covered by the house. If the deed did not convey this land, then it should be rectified so as to express the intention of the parties: *Hill v. Broadbent* (1898), 25 A.R. 159; *Fraser v. Mutchmor* (1904), 8 O.L.R. 613; *Winfield v. Fowlie* (1887), 14 O.R. 102. He also invoked the covenant for right to convey, asserting a breach thereof, unless the plaintiff received the land on which the house had stood. In the alternative, he asked damages for breach of the covenant.

A. C. Heighington, for the defendant, respondent, contended that there could be no reforming of the deed or rescission of the contract now, as there could be no *restitutio in integrum*: *Re Brenzel and Rabinovitch* (1918), 42 O.L.R. 394; *Cameron v. Cameron* (1887), 14 O.R. 561; *Shurie v. White* (1906), 12 O.L.R. 54; Halsbury's Laws of England, vol. 25, pp. 425, 462, 471; *Joliffe v. Baker* (1883), 11 Q.B.D. 255; *Prison Commissioners v. Clerk of the Peace for Middlesex* (1882), 9 Q.B.D. 506; *National Bank of Australasia Limited v. J. Falkingham & Sons*. [1902] A.C. 585. As there was no fraud, but only mutual mistake, there should be no damages.

Snow, in reply, referred to *Waterpark v. Fennell* (1859), 7 H.L. C. 650, and *Spencer v. Marriott* (1823), 1 B. & C. 457.

December 10. CLUTE, J.:—This is an appeal by the plaintiff from the judgment of the trial Judge, who dismissed the action with costs.

The facts are not in dispute.

The plaintiff, a labourer, entered into an agreement with the

defendant to purchase a house and lot, in the words and figures following:—

“June 12 / 13.

“This agreement between Edward H. Warman who agrees to sell and Herbert W. Hickman who agrees to purchase house and lot known as No. 144 north side of Glenwood avenue, city of Toronto, for the sum of \$1,500, payable as follows:

“\$400 as a deposit and \$1,100 on completion of sale. Mr. Hickman to get possession on last day of June, 1913; costs of deeds etc. to be paid by vendor.

“Witness:

E. H. Warman.

“Jno. E. Head.

H. W. Hickman.”

This agreement was signed after the parties had viewed the premises.

Prior to the negotiations, the defendant had had a survey made of his property, and the agreement was entered into on the assumption and belief by both parties that the survey was correct, and that the land intended to be conveyed consisted of the west half of lot 82 on the north side of Glenwood avenue, registered plan No. 866.

The defendant produced to the plaintiff, during the negotiations and before the agreement was signed, a plan dated the 16th April, 1909, made by Henry D. Sewell, O.L.S., shewing that the defendant had had a survey made of the said lot and built the house thereon according to the survey, and he pointed out to the plaintiff the posts which he alleged had been put there by the said surveyor.

Both parties believing, by mutual mistake, that the said survey was correct and relying upon the same, the defendant conveyed to the plaintiff, by deed dated June, 1913, the west half of lot No. 82 on the north side of Glenwood avenue as shewn on the said plan No. 866. By a subsequent survey it plainly appeared that the first survey was incorrect, and that the house and lot known as street No. 144 in fact extended 4 feet beyond the west half of lot 82.

The owner offered to sell to the plaintiff the 4 feet originally included in the purchase, or to allow the plaintiff to remove his house; but the plaintiff, not desiring more land, removed his house upon the said lot No. 82. The expenses of moving the same and incidental thereto amounted to \$125.

Upon the undisputed facts, the house and lot which the

App. Div.
1918

HICKMAN
v.
WARMAN.
Clute, J.

App. Div.
1918

HICKMAN
v.
WARMAN.
Clute, J.

plaintiff bought was house No. 144. The deed not having been made in accordance with the agreement, the plaintiff would have been entitled to succeed in an action for reformation to make it comply with the agreement; but, as the transaction has been completed, and the 4 feet have passed into the hands of a third party, the plaintiff is entitled to damages in lieu of specific performance; and, as he was compelled to remove his house to the land conveyed by the deed at a cost of \$125, he is entitled to damages for that amount to compensate for the loss: sec. 18 of the Judicature Act, R.S.O. 1914, ch. 56.

In *Turner v. Moon*, [1901] 2 Ch. 825, it was held that the proper measure of damages was the difference between the value of the property as it purported to be conveyed and its value as the vendor had power to convey it. This was followed in *Great Western R.W. Co. v. Fisher*, [1905] 1 Ch. 316, and in *Eastwood v. Ashton*, [1913] 2 Ch. 39, reversed in [1914] 1 Ch. 68, and restored in [1915] A.C. 900.

It is obvious that the damages to which the plaintiff would be entitled under the decision in the *Turner* case would be much more than the cost of removing the house, but evidence was not given upon which damages could be based upon the difference in value between the property as conveyed and intended so to be; it would be at least the cost of the removal of the house.

It may be suggested that he was bound to accept a deed of the additional 4 feet at \$30 per foot, but he was a labouring man, and he thought the removal of the house would cost less, and he did not want to pay additional taxes for the additional land, nor was he bound to do so. He is entitled to at least the cost of removal of the house upon the land conveyed, amounting to \$125.

The judgment below should be set aside and judgment entered for the plaintiff for \$125 with costs of the action and of this appeal.

MULOCK, C.J. Ex., agreed with CLUTE, J.

RIDDELL, J.:—The facts are not in dispute: the defendant in 1909 bought a block of vacant land composed of lots 82 and 84, each 50 feet wide, 82 being west of 84, lying on the north side of Glenwood avenue—he had a survey made of the block by an Ontario Land Surveyor, Mr. Sewell, who placed a post at each corner of the block, but did not divide the block into the two lots. The defendant says that he measured off a strip 25 feet wide of the

west side of the block from front to rear; and, leaving a strip of two feet for a sidewalk to the west, he built his house about 23 feet wide on what he supposed to be the west half of lot 82: this house was numbered No. 144, and the defendant lived in it.

In 1913, the plaintiff, who is a labourer, wished to buy a house, and was taken by one Head, who had it for sale, to see this house: as the plaintiff says, "Mr. Head said the house was for sale, and would I like to buy it, and I said, yes I would if it was all right." He did examine the house, was shewn over the premises by the defendant and his wife, and finally an agreement was drawn up and signed.

[The learned Judge set out the agreement as above.]

It was the intention of the plaintiff to buy the house as a residence, and that intention was known to the defendant; and it is plain from all the circumstances of the case that the land itself was not of importance except as being the lot upon which the house was built and by which it was surrounded.

The plaintiff and defendant went to the defendant's solicitor, who acted for both parties; he drew up the deed (to be particularly described below) by which it was intended to carry out the agreement formally—the plaintiff paid his money, took possession of the house, and has ever since occupied it as a dwelling.

Two or three weeks after the purchase, the owner of the land to the east told the plaintiff that he was on her lot about 4 or 6 feet, and told him to get off her property; but the plaintiff did nothing. This owner sold her lot, and the new owner had a survey made and found that the house was some 4 feet on the east half of lot 82. He wrote the plaintiff requiring him to remove his building without delay. This not being done, he offered to sell the 4 feet at \$30 per foot frontage, but the plaintiff believed he could move his building for less, and did remove the building some 4 feet to the west, at an expense of \$97.40. To that sum he added the cost of a new fence..... \$12
estimated damage to walls..... 12
estimated value of time lost by the plaintiff removing..... 18
estimated value of time lost by the plaintiff in law-suit..... 10

\$52,

and sued for \$150 in the County Court.

App. Div.
1918
HICKMAN
v.
WARMAN.
Riddell, J.

App. Div.
1918

HICKMAN

v.

WARMAN.

Riddell, J.

The deed turns out to be in pursuance of the Short Forms of Conveyances Act, of "all and singular . . . being composed of the west half of lot number eighty-two (82) on the north side of Glenwood avenue as shewn on a plan . . .;" it contains the usual covenants, but no mention is made of the house No. 144, which was the real object of purchase.

It is agreed that no fraud can be charged against the defendant; that both parties at the time of the purchase believed the house No. 144 to be on the west half of lot 82, and that both believed that the deed conveyed the house No. 144.

The learned County Court Judge (Denton) dismissed the action with costs, and the plaintiff now appeals.

Any right which the plaintiff might have had to rescission when he discovered that his deed did not convey the land upon which the house stood, he lost when he changed the position of the house, and therefore there could be no *restitutio in integrum*. Nor does he claim rescission in this action: he says that the defendant sold him the house and lot known as No. 144, that that implies at least all the land covered by the house and upon which the house was built, that either the deed conveys this land or there is a mistake in reducing into formal shape the real agreement.

That Equity will reform the deed where there is a mistake in the expression of a real agreement entered into, is quite clear; that a mistake mutually made by the parties as to the effect of a deed, may give ground for a rectification is equally clear: Halsbury's Laws of England, vol. 21, pp. 11, 12, and cases cited.

Where, as here, there has been a previous written agreement, difficulty has sometimes been made over going outside the written agreement into the circumstances by parol evidence—but that has been when the formal document agrees with the written agreement and the agreement is in itself clear and unambiguous: *Thompson v. Hickman*, [1907] 1 Ch. 550, and cases cited. Whether that is the law since *Fowler v. Sugden* (1916), 115 L.T.R. 51, 85 L.J.K.B. 1090, we need not consider. Here the deed is not in accord with the written agreement, and we may look not only at the agreement but at all prior relevant transactions: *Ellis v. Hills* (1892), 67 L.T.R. 287.

From all the circumstances it is quite clear that the defendant intended to sell and the plaintiff to buy the house with the land on

which it stood: and the deed should be reformed accordingly:
Whiteley v. Delaney, [1914] A.C. 132.

The evidence establishes that the defendant and plaintiff both thought that the land went west to about 2 feet west of the house and east to the eastern side of the house. The land desired was from the east side of the house to a line 2 feet west of the house, whereas in fact the deed gives east only to a line 4 feet west of the east side of the house. The deed being rectified should cover the land to the former position of the east side of the house. We should, if possible, treat the deed as being rectified, the Court having equitable as well as legal jurisdiction: *Walsh v. Lonsdale* (1882), 21 Ch.D. 9; *Rogers v. National Drug and Chemical Co.* (1911), 23 O.L.R. 234, 24 O.L.R. 486. Of course we cannot actually rectify the deed, as the right of a third party, a purchaser for value without notice, prevents: but we may award damages: Ontario Judicature Act, sec. 18; Story's Equity Jur., 2nd ed., sec. 798, and notes. In assessing such damages we proceed as though the deed were rectified as between the plaintiff and defendant. Then the covenant 2 in the Short Forms Act, R.S.O. 1914, ch. 115, is effective as to this land also—the defendant covenants that he had the right to convey notwithstanding any act of his own, whereas he had already sold the 4 feet.

The plaintiff is entitled to damages for breach of this covenant, and to be put in the same position as if the deed had properly conveyed the 4 feet—this he could have brought about by an expenditure of \$120, but that would load him with extra land on which he would have to pay taxes etc. in perpetuity—a burden which we have no right to compel him to assume. He pursued the better and what he thought the cheaper way, and moved his house, and he should be paid a reasonable sum by way of damages, but he cannot be allowed the time lost in connection with the action, and I think the sum of \$125 is fair under all the circumstances.

I would allow the appeal and direct judgment to be entered for the plaintiff for \$125, with costs here and below on the County Court scale.

SUTHERLAND, J., agreed in the result.

Appeal allowed.

App. Div.
1918

HICKMAN
v.
WARMAN.
Riddell, J.

1918

[APPELLATE DIVISION.]

Dec. 10

JARVIS V. CONNELL.

Brokers—Transactions in Company-shares—"Borrowing Stock"—Payment Made by Borrower, whether for "Marking up" or "Closing out" Transaction—Evidence—Finding of Fact of Trial Judge—Reversal on Appeal.

The plaintiff in February, 1916, "borrowed" from the defendants, stock-brokers, a block of shares of the stock of a mining company, and paid them the market price of the stock on that day, as security. In such a transaction, the lender can at any time call in the loan, and then the borrower must return the stock, receiving his money back; but the more usual course is for the borrower to pay the lender the amount representing the rise in value of the stock and allow the loan to be continued until a new demand by the lender—this is called "marking up." If the borrower fails to return the stock or to "mark up," the lender may buy in to protect himself and charge the borrower with the difference in price. On the 29th April, 1916, the defendants asked the plaintiff to "close out the account" on the 1st May, and threatened to close it out on that day if the plaintiff did not "bring the stock in." A day or two after the 1st May, the plaintiff went to the defendants' office and paid \$400, by a cheque which had no memorandum on its face as to the object for which it was given. This was the sum which he should have paid to entitle him to retain the stock as his own and so close out the account; it was equally the sum which he should have paid to "mark up"—being the amount by which the stock had risen. In October or November, 1917, the plaintiff offered to return the stock and demanded the return of his money. The defendants refused to return the money, and this action was brought to recover it. The defendants asserted that they had, on the 1st May, 1916, bought stock to replace the borrowed stock, and had advised the plaintiff; but the plaintiff did not know of the purchase, and received no notice till long afterwards. The plaintiff swore that he paid the \$400 for "marking up," and there was no contradiction:—

Held (KELLY J., dissenting), that, upon the evidence, it must be found that the money was paid for "marking up," and that the plaintiff was entitled to recover the amounts he had paid, on his handing back the borrowed stock.

Judgment of ROSE, J., the trial Judge, reversed; the majority of the Court disagreeing with him upon the facts.

Beal v. Michigan Central R.R. Co. (1909), 19 O.L.R. 502, and *Dempster v. Lewis* (1903), 33 Can. S.C.R. 292, followed.

AN appeal by the plaintiff from the judgment of ROSE, J., at the trial, dismissing the action, which was brought for the return of money paid by the plaintiff to the defendants as security for a loan of shares of the stock of a mining company.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

The plaintiff, who was rather a speculator, borrowed from the defendants, a firm of stockbrokers, 2,500 shares of Temiskaming stock, on the 3rd February, 1916. The meaning of such a transaction is that the borrower pays to the lender the market price,

at the time, of the stock, as security; the lender can at any time call in the loan, and then the borrower must return the stock, receiving his money back; he has an option, however, and the more usual course is for the borrower to pay the lender the rise in value of the stock and allow the loan to continue until a new demand by the lender. This is called "marking up."

If the borrower fail to return the stock or to "mark up," the lender may buy in to protect himself and charge the borrower with the difference in price. (In certain cases this buying in must be done by an officer of the Stock Exchange; but that rule the learned Judge held did not apply to the present case, and I agree with him.)

The plaintiff paid \$1,625 on the day of the loan; and "marked up" on the 19th April, \$300—placing on the face of the cheques "2000 Temisk." and "Margin" respectively. On the 29th April (Saturday), a new demand was made for Monday morning, the 1st May, according to the evidence which the learned trial Judge believed.

1918
JARVIS
v.
CONNELL.

Connell, one of the defendants, says:—

"Personally I saw Mr. Jarvis at the King Edward Hotel on the Saturday previous to the 1st of May, and I told him that he had no margin on the loan account, and I wanted him to bring the stock in on Monday and close the account out, and he seemed to laugh about it, and said he would be in on Monday morning. I said, 'Well, the account is going to be closed out the first thing Monday if you don't bring the stock in. We want this account closed up'."

And later on one Graham, who was in the office of the defendants, telephoned to the plaintiff: "We want you to close this loan account up; we want you to bring the stock in; we want to have the transaction closed. We understand you are going away, and we want to have this matter closed up."

The plaintiff seems to have treated the demand lightly. He was in khaki, and was expecting soon to go overseas, and he seems to have forgotten all about it.

But he went to the office of the defendants early in the following week, and paid \$400 by a cheque, which has no memorandum on its face as to the object for which it was given. This was the sum which he should have paid to entitle him to retain the stock as his own and so close out the account: it was equally the sum which he

1918

JARVIS

v.

CONNELL.

should have paid to "mark up"—being the amount by which the stock had risen.

The plaintiff went overseas on the 16th May, 1916, and did not return until the end of October, 1917. On his return he offered to return the stock and demanded the return of his money. This being refused, he brought this action in November, 1917. The action was dismissed by Mr. Justice Rose, and the plaintiff now appeals.

October 29. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

J. R. Roaf, for the appellant. The \$400 cheque was given by the appellant to the defendant Connell for the purpose of "marking up," and not of closing out the account. The plaintiff's evidence on this point was not contradicted. The evidence of the defendants that they had bought in stock at 80 to cover the plaintiff's default should not be credited, the alterations in their books to shew the transaction being of a very suspicious nature, to say the least. Neither the alleged demand nor the manner of buying in the stock conformed to the rules of the Standard Stock Exchange. The appellant has findings of the learned trial Judge to contend against, but this Court is not bound to adopt those findings if they are clearly wrong.

C. W. Livingstone, for the defendants, respondents. The findings of the learned trial Judge are amply supported by the evidence. As to the rules of the Standard Stock Exchange, they do not apply to a loan. There was clear evidence of the demand to close the transaction, and the \$400 cheque was given following that demand, and was a closing out of the account. The buying in at 80 was proved, and the alterations in the books were explained.

Roaf, in reply.

December 10. RIDDELL, J. (after setting out the facts as above):—The main point in the case is as to the \$400 paid on the 1st May, 1916; if this was in reality "marking up," it is admitted that the plaintiff must succeed: if it was a closing out of the account, admittedly he must fail.

The trial Judge finds: "I am inclined to think that he came in because of Mr. Connell's statement to him that the stock was

going to be bought in, and that his purpose in coming in was to put up enough money to make his deposit equal to the value of the borrowed shares, and so to persuade the defendants to desist from their proposal of calling in the loan." I think so much is perfectly clear on the evidence.

The defendants now assert that they had, on Monday, bought stock to replace the lent stock at 80, and they say that they sent the ordinary slip to the plaintiff: "We have this day bought for you 2,500 shares of Temiskaming at 80 cents;" but the plaintiff did not know of the purchase, if there was one, and he received no notice till long afterwards.

The plaintiff went to the office intending to pay the \$400 for "marking up;" he knew nothing of the closing out by the purchase of stock or otherwise; he swears that he paid it for marking up, and there is no contradiction of any kind. The only cross-examination on this point is as follows (p. 35 of the notes of evidence):—

"Q. The purpose of your paying the \$400 to the defendants was to square your account with the defendants as of that day?
A. Yes, mark it up to the market."

The main object of the cross-examination seems to be to shew that the money was not paid to Connell.

Lord Herschell, L.C., has some valuable remarks as to the duty of cross-examining counsel, where it is intended to attack the credibility of a witness, in *Browne v. Dunn* (1893), 6 R. 67, at pp. 70, 71 (H.L.) The Court is justified in considering that there is no real intention to attack the credibility of the story told by any witness unless he is cross-examined somewhat fully and given an opportunity to explain any circumstances which may tell against him.

Graham, one of the defendants, cannot say anything about the \$400 (p. 56), nor can the bookkeeper, Jacobson, while Connell, to whom the plaintiff (p. 34) swears that he gave the cheque, neither denies receiving the cheque nor that it was paid for "marking up." On cross-examination of the plaintiff (p. 35) he is asked:—

"Q. If Connell goes into the box and swears that you did not pay him this money at all, what will you say? A. I say there is the cheque.

"Q. If Connell says that you did not pay it to him personally, will you contradict him? A. I will say that it is my memory that I did pay it to him."

App. Div.
1918

JARVIS
v.
CONNELL.
Riddell, J.

App. Div.
1918

JARVIS
v.
CONNELL.
Riddell, J.

Then Connell is called and says nothing about the matter.

In that state of the evidence, I cannot follow the learned Judge when he says: "He thinks that he gave the cheque to Mr. Connell. In this he seems to be mistaken; I think he must have given it to some clerk in the office."

On the principle laid down in *Beal v. Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, and similar cases, we are bound to look at the reason given by the trial Judge, and if (p. 506) "he has misapprehended the effect of the evidence or failed to consider a material part of the evidence" we must apply our own minds to the determination of the facts. I think, in the absence of contradiction by Connell, we should find that the money was paid to him by the plaintiff, and was for marking up.

The extremely suspicious change in the books of the defendants, and the impossibility of reconciling the alleged buying in for the plaintiff on the 1st May with contemporaneous entries, would cause us to decline to accept the defendants' account.

It is to me wholly incredible that there was a buying in at 80 for the plaintiff, as alleged by the defendants. There is no rule forbidding us from disagreeing with the trial Judge even on questions of fact: *Dempster v. Lewis* (1903), 33 Can. S.C.R. 292; and, while this will not be done except in very clear cases, I think this one of the cases.

I would allow the appeal and direct judgment to be entered for the plaintiff (on his handing back the borrowed stock to the defendants or their solicitor) for \$1,975 and interest from the teste of the writ, and costs here and below.

MULOCK, C.J. Ex., and CLUTE and SUTHERLAND, JJ., agreed with RIDDELL, J.

KELLY, J. (dissenting):—This is an appeal from the judgment of Mr. Justice Rose dismissing the plaintiff's action with costs.

The learned trial Judge had apparent difficulty in dealing with the evidence, which was to him, and is to one reading the transcription of it, not wholly satisfactory.

There are two outstanding features in the case: (1) whether the plaintiff, following the interview the defendant Connell speaks of at the King Edward Hotel on the Saturday preceding the 1st May,

1916, paid the defendants \$400 on or about the 1st May or the 2nd May, by reason of the demands sworn to, to bring into the defendants' office the stock on the Monday following the interview, so as to close out the account; and (2) whether the defendants, at the time, bought in 2,500 shares of Temiskaming stock because of the plaintiff's failure so to bring in the stock, and as part of the process by which the account should be closed.

The judgment appealed from finds that there was a sufficient demand; in that I agree. The defendant Connell swears positively to making a demand at the King Edward Hotel on the Saturday preceding the 1st May, including the warning that "the account is going to be closed out the first thing Monday if you don't bring the stock in; we want this account closed up."

There is no uncertainty about the meaning of that language. If this evidence is to be accepted, and it was accepted by the trial Judge, then not only was there a demand but also a very positive declaration of the consequences which would follow on failure to comply with it.

The plaintiff, when called in reply, and when this evidence of Connell was brought to his attention, did not go further than to say that he had no recollection of Connell making the demand on the Saturday, and that he thought he would have remembered it if Connell had made the demand. It should have been and perhaps was no surprise to the plaintiff that the demand was made, for there is evidence that, three or four days prior to the 1st May, the defendant Graham communicated with the plaintiff and said: "We want this loan account closed up; we want you to close this loan account up; we want you to bring the stock in; we want to have the transaction closed. We understand you are going away, and we want to have this matter closed up."

The only attempt at contradiction of this is when the plaintiff said he was prepared to swear that Graham never demanded the stock; but, when pressed, he qualified this statement by saying that Graham never seriously demanded the return of the stock. He seems not to have treated the demand seriously if one may judge from other parts of his evidence. It is evident that the defendants felt uneasy over the plaintiff's pending departure for overseas and the fluctuations in the price of the stock in question while the account between them was still open. What was more to be

App. Div.
1918
JARVIS
v.
CONNELL.
Kelly, J.

App. Div.
1918

JARVIS
v.
CONNELL.
Kelly, J.

expected than that they would desire to have the account closed out?

Accepting the finding of the trial Judge that there was a demand, and having regard to the evidence of the other demand by Graham three or four days earlier, is it not a reasonable inference that the plaintiff, when he went to the defendants' office next after the occasion of Connell making the demand, would have in mind that the account would be closed out if he did not bring in the stock; that he would be expected to abide by one or other of these alternatives, and that that was what would be in the defendants' minds at the time? Is it not a reasonable assumption that, unless he expressly suggested to them some different arrangement when he did not bring in the stock, the only result would be the closing out of the account, a line of procedure consistent with the demand and notice of the previous Saturday?

When he came to the defendants' office he brought with him a cheque for \$400, and he says he saw the defendant Connell and handed him the cheque. The trial Judge says that the plaintiff seems to have been mistaken when he says he gave the cheque to Connell—that he must have given it to some clerk in the office.

In the absence of positive contradiction by Connell, I am prepared to accept, for the purposes of the present discussion, the plaintiff's statement that he did on that occasion see Connell; but he did not in his evidence say that he told or even hinted to the latter that the payment was not in pursuance of Connell's previous demand, and for the very purpose of complying with the alternative of not bringing in the stock. He puts it in this way on his examination at the trial:—

"Q. You say that you went into the office of the defendants and paid that \$400 to the defendant Connell? A. Yes.

"Q. You are quite sure of that? A. Yes.

"Q. And you shook hands with him and went away and everything was rosy, as you said yesterday? A. Yes.

"Q. And Connell said nothing to you about making arrangements for this stock transaction? A. No.

"Q. That is right, he said nothing to you? A. He said nothing to me or I said nothing to him.

"Q. And the matter was just left open? A. Well, as I say, I was a soldier; I didn't know when I would go, or I might be here six months."

In his examination for discovery, when asked if he had any recollection of the payment of this \$400 on the 2nd May, he answered: "Yes, I have a recollection that I went in there rather late in the evening—it was a rainy day, I think, and paid my cheque for \$400, and *made up my mind* that that would keep the thing for some time if the market went down." At the trial he admitted the correctness of this statement. But that to which he made up his mind he did not communicate to Connell, who, so far as the plaintiff's evidence is to be accepted, was left in the same frame of mind, and reasonably would expect the same consequences to follow, as when he made the demand on the previous Saturday, under the penalty to the plaintiff of having the loan closed out on failure to bring in the stock on Monday.

One other circumstance is significant. On a prior occasion—the 19th April—the plaintiff gave to the defendant a cheque for \$300 on this stock "to mark it up," that is, to pay the amount of the rise in its value, and the cheque bears on its face the word "margin" to indicate the purpose of the payment.

There is no indication whatever on the \$400 cheque of the purpose for which it was paid. Had the plaintiff stated on that cheque that it was "margin," or had he sworn that he distinctly told Connell that he was making the \$400 payment to "mark up" the stock, I would conclude that the defendants had sufficient notice that the plaintiff's purpose was not to pay in pursuance of the demand made and the notice given on the previous Saturday, but that it was his intention that it was a "marking up;" and, the defendants accepting the cheque with this knowledge, I would also conclude that they were bound to a marking up transaction, instead of a closing out of the account. But that is not what happened. What the plaintiff made up his mind to, but did not communicate to the defendants, did not, it need not be said, constitute a bargain or understanding that the payment of the \$400 was to be accepted as a "marking up."

The finding as to whether the defendants bought in the shares at the time they say they did is in their favour. Were it not for the manner and time of making the entries in their books of the purchase, which they say was made at or about the time the plaintiff paid in the \$400, no doubt would have been thrown upon it.

The trial Judge, although expressing the difficulty he experi-

App. Div.
1918
JARVIS
v.
CONNELL.
Kelly, J.

App. Div.
1918

JARVIS
v.
CONNELL.
Kelly J

enced in accounting for that part of the evidence, felt bound to accept and did accept Graham's evidence of the purchase.

A reference to the evidence of Jacobson, who was employed to audit the defendants' books in his spare time, and had charge of these books in May, 1916, and for some months prior thereto, affords some explanation why the record of the purchase was not entered up promptly when the purchase was made. His evidence on that point is that on the 9th June, in going through the books, he discovered that the transaction—purchasing the stock on account of the plaintiff on the 1st May—was incorrectly entered in the books against Howard Graham & Company, instead of W. H. P. Jarvis; that the discovery was made early in June, when he was getting out his balance for May, he knowing that Mr. Graham had purchased this stock for W. H. P. Jarvis on the 1st May, information as to which he got from Graham about the 1st May. He also explains that, in lending the stock in the first instance, "Graham lent it as he" (Graham) "assumed out of Howard Graham & Company's stock, and in closing the account, on account of his want of knowledge of bookkeeping, he simply then shewed the transaction as having bought the stock again for Howard Graham & Company," and that, "as soon as I went through the books I knew that the account of W. H. P. Jarvis had been closed on the 1st May, and when I went through the books at the end of May and got out a balance-sheet and saw this account open, I went to Graham, and went through the books, and saw how the transaction had gone through, and made the adjusting entry there on the 9th June."

And in cross-examination (p. 68): "Mr. Graham said he purchased these at 80 cents to close out the Jarvis account, and I didn't notice the error until making up the books for the month of May. I knew that some adjustment was necessary, because I hadn't troubled any more about the account after the 1st May, knowing it had been closed."

There seems quite sufficient throughout the evidence to support a finding in the defendants' favour on this branch of the case; believing, as the trial Judge did believe, Graham's evidence, which is materially supported by that of Jacobson and in other respects as well; while the plaintiff's memory, on other incidents of the transaction, the trial Judge has found to be unreliable.

I see no sufficient reason for disturbing the finding of the trial Judge. Even without giving to his opinion the weight due to that of one who had the advantage of weighing the evidence, with the witnesses before him, in a case of unusual uncertainties and contentions, I would, from a mere perusal of the evidence, feel bound to some extent to the conclusion he reached.

The plaintiff assumed the onus of demonstrating the proposition embodied in his claim, and he failed to discharge that onus to the satisfaction of the trial Judge.

The latter likewise did not give effect to the plaintiff's contention that the form of the demand and the manner of buying in the shares upon default in complying with the demand were regulated by the by-laws of the Standard Stock Exchange; that conclusion should not be disturbed.

In my opinion, the appellant fails, and the judgment appealed from should be affirmed with costs.

Appeal allowed (KELLY, J., dissenting).

App. Div.
1918
JARVIS
v.
CONNELL.
Kelly, J.

[APPELLATE DIVISION.]

RE SOLICITORS.

1918
Dec. 10.

Solicitors—Order for Taxation of Itemised Bill of Costs—Lump-sum Allowed by Taxing Officer—Reference back with Direction to Pass upon each Item—Non-tariff Items—Evidence.

Under an order for the taxation of an itemised bill of costs rendered, the Taxing Officer must *tax* the bill, pass upon each item; he has no power, acting under the order, to allow a bulk-sum.

Per MULLOCK, C.J. Ex.:—If a bill contains non-tariff charges, the value of the services charged for must be determined upon evidence submitted.

Per RIDDELL, J.:—The duty of the Taxing Officer, under an order to tax, is to deal *seriatim* with each item by way of allowance or disallowance: *In re Grant Bulcraig & Co.*, [1906] 1 Ch. 124, 128.

AN appeal by the executors of Thomas Robertson, deceased, from an order of ROSE, J., in the Weekly Court, dismissing an appeal by the executors from the report or certificate of the Senior Taxing Officer upon a reference for taxation of a bill of costs of the solicitors. The Taxing Officer allowed the solicitors a bulk-sum of \$450 in respect of the services for which charges were made in

1918
RE
SOLICITORS.

the bill; the complaint was that he should have passed upon each item in the bill.

October 29 and 31. The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

H. S. White, for the appellants, said that he objected to the principle adopted by the Taxing Officer in allowing a lump-sum, instead of taxing the various items seriatim. It was his duty to pass upon the several items of the bill. If there were non-tariff charges, they could not be passed upon without oral evidence. Counsel referred to the following authorities: *In re Grant Bulcraig & Co.*, [1906] 1 Ch. 124; *Re Solicitor* (1917), 12 O.W.N. 191; *Re R. L. Johnston* (1901), 3 O.L.R. 1; *In re Richardson* (1870), 3 Ch. Chrs. 144; *Gould v. Ferguson* (1913), 29 O.L.R. 161, 14 D.L.R. 17.

R. McKay, K.C., for the solicitors, respondents, argued that the items in the bill were for work done out of Court, and were not tariff items; and, therefore, the Taxing Officer was justified in allowing a lump-sum: *Murphy v. Corry* (1906), 7 O.W.R. 363; *Re Solicitors* (1912), 27 O.L.R. 147, 7 D.L.R. 323; *Re Solicitor* (1908), 12 O.W.R. 1074.

White, in reply.

December 10. MULOCK, C.J. Ex.:—One Thomas Robertson, since deceased, under a guaranty given by him and others to the Molsons Bank, became liable to pay certain solicitors' fees, charges, and expenses; and, after his death, an itemised bill thereof was rendered to his executors. Thereupon the latter applied for and obtained an order for the taxation of the bill, they submitting to pay what, if anything, should be found due to the solicitors upon such taxation.

The Taxing Officer, instead of taxing the various items, allowed the solicitors a bulk-sum of \$450, and from his certificate the applicants appealed to Rose, J., who dismissed the appeal; and this is an appeal by the executors from such decision.

The order having directed that the itemised bill be taxed, it became the duty of the Taxing Officer to adjudicate upon each item. This he has not done, but instead has allowed a bulk-sum. Such is not a taxation within the meaning of the order, and I

therefore think the certificate of the Taxing Officer should be set aside, with costs, and the matter be referred back to that officer to be dealt with as directed by the order.

During the argument, counsel for the appellants stated that the bill included some non-tariff charges. Should such be the case, the Master can only determine the value of such services on evidence.

App. Div.
1918
—
RE
SOLICITORS.
—
Mulock, C.J.Ex.

CLUTE, SUTHERLAND, and KELLY, JJ., agreed with MULOCK, C.J. Ex.

RIDDELL, J.:—The late Thomas Robertson with others gave a guaranty to the Molsons Bank, upon which (for reasons unnecessary to go into) he became liable to pay the sum of over \$76,000, as well as the costs of the bank's solicitors in obtaining payment of the same. The amount of the claim has been paid by the appellants, the executors of the last will and testament of the said Thomas Robertson; but the costs have not been paid. The bank's solicitors rendered their bill of costs to the appellants, and consented to an order for the taxation thereof. Thereupon an order was made by the Master in Chambers "that the bill of fees, charges, and disbursements delivered to the applicants by the above-named solicitors, acting for and on behalf of the Moslons Bank, under their indenture of guaranty dated the 2nd September, 1909, from the said Thomas Robertson and others to the said Molsons Bank, be referred to a Taxing Officer of this Court to be taxed."

Objections to the bill were duly served upon the solicitors: Mr. Thom, the Senior Taxing Officer, considered that the solicitors might have claimed \$706; but, as they did not ask so much, but only \$450, he held "their bill taxed at \$450." He also allowed the solicitors the costs of taxation, \$34.06, and certified to the sum of \$484.06 as being due "in respect of said bill." An appeal from this report was dismissed by Mr. Justice Rose, and the executors now appeal.

Here we have not to do with an order to "moderate" costs, or with any special directions, but with the ordinary order of reference to taxation.

The bill consists of some 90 smaller items, ranging from \$50 for special advice to the familiar 50c. and 2c. for a letter; and there

App. Div.
1918

RE
SOLICITORS.

Riddell, J.

is one special item, "Fee on assignts. & transf. $\frac{1}{4}$ of 1% on \$77,000, \$192.50."

The Taxing Officer, Mr. Thom, has made his report and given his reasons. I am unable to agree with the Taxing Officer: none of the reasons given at all affects the rights which these appellants have under the order of reference. We are not called upon to express an opinion as to whether the bill of costs should have been referred to be taxed—the parties have selected their own forum and cannot now object: *Re R. L. Johnston*, 3 O.L.R. 1.

Nor, as I think, are we called upon to express an opinion on the proper way of dealing with the large item or any item—many cases have been cited to us as to that point, but we may assume that the Taxing Officer will do his duty in the premises, and that he needs no instructions from us.

All this appeal calls upon us to do is to determine whether it is the duty of the Taxing Officer, under this order, to pass upon the several items of this bill. I think it is.

Often the more clear a principle is, the greater difficulty to find express authority for it. I do not know of any express decision that a fee simple is the highest estate known to our law.

The books contain many hints: in *Wilkinson v. Smart* (1875), 33 L.T.R. 573, quoted and approved in this Court in *Gould v. Ferguson*, 29 O.L.R. 161, at p. 163, it is said that items of a bill must be clearly shewn "to give the Master an opportunity of taxing it." (See also *Gundy v. Johnston* (1913), 28 O.L.R. 121, 7 D.L.R. 300, 12 D.L.R. 71, 48 Can. S.C.R. 516, 15 D.L.R. 295.)

"The attorney should have delivered a bill of his whole costs in order that the client might see what was charged in respect of each item:" *per* Erskine, J., in *Waller v. Lacy* (1840), 1 M. & G. 54, at pp. 74, 75.

"If the executor says, 'There are items in the bill which I do not understand,' why should not the propriety of those items be considered?" *per* Stirling, J., in *In re Park* (1889), 41 Ch.D. 326, at p. 329.

Many other dicta to the same effect could be cited, but it is unnecessary to multiply examples.

The only express authority of which I am aware is in the judgment of Harwell, J., in *In re Grant Bulcraig & Co.*, [1906] 1 Ch. 124,

at p. 128: "To tax is to deal seriatim with each item by way of allowance or disallowance." I think the duty of the Taxing Officer under an order to tax is correctly stated by the learned Judge.

There is no difficulty in the way: apparently in *Re R. L. Johnston*, 3 O.L.R. 1, the bill contained a number of items which were separately taxed and also a large item which was dealt with by itself—the whole bill being certified in one sum, the total of the allowances on the smaller items and on the large item. The same method can, if thought proper, be adopted in the present case.

As to the application by the solicitors to this Court to be allowed to amend their bill by striking out the smaller items, I know of no law preventing them from abandoning these items before the Taxing Officer, but we should not interfere at this stage.

The appeal should be allowed with costs throughout, which costs the solicitors may at their option have set off *pro tanto* against the amount to which they may be found entitled.

I am quite conscious that all this may in the long run prove of no pecuniary value to the appellants: we have nothing to do with that—they are entitled to any legal rights they press for.

Appeal allowed.

[APPELLATE DIVISION.]

FLEXLUME SIGN CO. LIMITED V. GLOBE SECURITIES CO.

1918

Oct. 18.
Dec. 9.

Costs—Counsel Fees—Taxation between Party and Party of Defendants' Costs of Several Actions Stayed to Abide the Result of another Action—No Actual Trial—Right of Defendants to Give Notices and Set down for Trial—"Counsel Fee at Trial"—Solicitor (as Counsel) Taking his own Brief—Quantum of Counsel Fees—Discretion of Taxing Officer—Interference with in Special Circumstances—Fee Allowed in each Action—Appeal to Divisional Court from Order of Judge in Chambers on Appeal from Taxation—Right to Appeal without Leave—Rule 507.

An order of a Judge in Chambers, affirming or reversing the rulings of the Taxing Officer upon taxation of the costs of one party against another, is an order "which finally disposes of the whole or part of the action or matter" (Rule 507)—it finally disposes of the right of one party to receive money by way of costs from the other; and therefore from such an order an appeal lies without leave.

Talbot v. Poole (1893), 15 P.R. 274, approved.

Ten actions were brought by the same plaintiffs against ten several defendants. One of the ten actions was tried and dismissed. The other nine actions were then set down by the respective defendants for trial and notices of trial were given; but an order was made staying the trials until the result of an appeal

App. Div.
1918

RE
SOLICITORS.
Riddell, J.

1918

—
 FLEXLUME
 SIGN CO.
 LIMITED
 v.
 GLOBE
 SECURITIES
 Co.

in the action which had been tried should be known. The appeal was heard and dismissed; and, pursuant to an undertaking, judgments were entered dismissing the other nine actions with costs. The solicitor for the ten defendants was also counsel in the action that was tried, and was to be counsel in the other nine actions. Upon taxation of the defendants' costs, a "counsel fee at trial" of \$100 was allowed in each of the nine actions. Upon appeal, a Judge in Chambers was of opinion that no "counsel fee at trial" should have been allowed, but, upon the suggestion of the plaintiffs, allowed \$100 in the nine actions. Upon further appeal to a Divisional Court:—

Held, that the defendants were justified in setting down the nine actions for trial and giving notice of trial; that thereupon the solicitor became entitled to deliver briefs to counsel, and, if intending to take his own brief, was entitled to a "counsel fee at trial."

Although, as a general rule, the discretion of the Taxing Officer is not to be interfered with as to quantum, the Court is not precluded from interfering in very special circumstances—and such circumstances existed here.

The costs between party and party are the costs of the litigant; each bill of costs is a separate matter; and, each being taxed by itself, a counsel fee should be taxed in each.

In each of the nine actions a "counsel fee at trial" of \$50 was allowed.

AN appeal by the plaintiffs in the above and eight other actions, brought by them each against a different defendant, from the certificate of the Senior Taxing Officer upon taxation of the party and party costs of the defendants in the nine actions, which costs were to be paid by the plaintiffs.

The actions were for infringement of a patent for an invention.

An action was brought by the plaintiffs—not one of the nine actions—against the Macey Sign Company Limited; it was tried by SUTHERLAND, J., who on the 29th May, 1916, dismissed it: *Flexlume Sign Co. Limited v. Macey Sign Co. Limited* (1916), 10 O.W.N. 305.

The nine actions had been commenced before judgment was given in the *Macey* action. On the 1st June, 1916, the defendants in the nine actions gave notices of trial and entered the actions for trial at the Toronto non-jury sittings. On the 7th June, the plaintiffs moved before the Master in Chambers to stay the trial of the nine actions. The motion was refused. The plaintiffs appealed, and upon the appeal BOYD, C., on the 21st June, 1916, made an order staying the proceedings in the nine actions until the result of an appeal in the *Macey* case should be known, on the plaintiffs undertaking that they would allow judgment to be entered for the defendants with costs if the appeal in the *Macey* case should be determined against the plaintiffs: *Flexlume Sign Co. v. Globe Securities Co.* (1916), 10 O.W.N. 380.

The appeal in the *Macey* case failed: *Flexlume Sign Co. Limited* v. *Macey Sign Co. Limited* (1917), 12 O.W.N. 89.

The nine actions were accordingly dismissed with costs to the defendants; and on the taxation of these costs the Taxing Officer allowed a counsel fee at trial of \$100 in each action.

1918
FLEXLUME
SIGN CO.
LIMITED
v.
GLOBE
SECURITIES
Co.

October 18. The plaintiffs' appeal from the Taxing Officer's certificate was heard by MEREDITH, C.J.C.P., in Chambers.

J. M. Bullen, for the plaintiffs.

Frank Arnoldi, K.C., for the defendants.

October 18. MEREDITH, C.J.C.P.:—In all taxations of costs it should be borne in mind that allowances are to be made only for services actually performed, fees actually earned, and outlays actually incurred, all within the limitations which the tariff contains; that nothing is to be allowed for imaginary services, or services which might have been but were not performed: and that, in addition to this, the practice and the Rules, which have the force of legislation, prohibit in the taxation of party and party costs the allowance of costs for any proceedings unnecessarily taken, or not calculated to advance the interests of the party in whose behalf they were taken, or which were incurred through over-caution, negligence or mistake, or which do not appear to have been necessary or proper for the attainment of justice or defending the rights of the party (Rule 667). The rule has been admirably stated in these words of a learned Judge most capable of dealing with the subject:—

“It is of great importance to litigants who are unsuccessful that they should not be oppressed by having to pay an excessive amount of costs. . . . The costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct the litigation, and no more. Any charges merely for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them.” *Smith v. Buller* (1875), L.R. 19 Eq. 473, 475 (*per* Malins, V.-C.)

The questions involved in this appeal are whether the solicitor for the defendants in the nine actions in which the appeal is brought should have been allowed in each case, in the taxation of party and party costs, a “counsel fee at trial;” and if so in what amount?

Meredith,
C.J.C.P.

1918

FLEXLUME
SIGN CO.
LIMITED

v.
GLOBE
SECURITIES
Co.

The Taxing Officer gave him \$900, \$100 in each case, though none of these cases came to trial, and although in a tenth case, of the same kind, which did go to trial, he gave to the solicitor \$500 as a counsel fee at the trial. I said "gave to the solicitor" because there was no other counsel for any of the defendants, and he alone gets the \$1,400 counsel fees, if the Taxing Officer's allowances stand.

All the cases were brought by one solicitor for the one plaintiff: the solicitor-counsel who has been allowed that large sum being, as I have said, the one solicitor for all the several ten defendants.

That the cases were substantially alike is shewn by the fact that, after the trial of the one and before any trial of the others, it was arranged, and an order made upon that arrangement, that none of the nine cases should be tried, but that the fate of each should be determined by the ultimate fate of the one which was tried: and the ultimate fate of all was a dismissal of the action with costs.

The nine cases were set down for trial after the trial of the tenth: but they were set down for trial at the Toronto non-jury sittings, which, as every one knows, may have meant a trial only weeks or months afterwards quite as much as only days afterwards. And, the other, substantially same, case having been tried and being in appeal, there could hardly have been any excuse for bringing the nine on for trial, or any likelihood of having them tried, until the result of the appeal in the case tried was known: a view which must have been entertained by the Court as well as the parties, as is shewn by the order which was actually made tying the nine down to the result in the other.

No "counsel fee at trial" was paid: was any earned?

No evidence seems to have been given in the taxing office upon the subject: and when, here, the evidence which a trial brief should carry is called for, a clean copy of the pleadings is produced, a paper which is in no sense a brief, but more like something written only for the purposes of taxation as if a brief. There is nothing produced having the semblance of a brief of evidence, or to shew any kind of service such as "counsel fee at the trial" would cover. And why should there have been any such services rendered? Counsel who would have taken the brief at the trial was the solicitor in the action: having had instructions for action, instructions for pleading, for examinations for discovery, advising on evidence, if any,

and other services as solicitor in the action. He was familiar with the whole case, and so in a very different position from counsel retained for the trial only, who would need to learn, some time before the trial, part at least of all that the solicitor-counsel already knew.

As the matter now stands, there is no evidence upon which either counsel fee, or brief, at the trial, could justly be allowed; but the solicitor asserts that such evidence can be given; in these circumstances it seems to me that the taxation should be reopened, and that the Taxing Officer should inquire whether in fact any services were rendered such as the practice and Rules require, entitling the defendants to any fee with brief at the trial: but, as to the amount, that which has been allowed seems to me to be beyond any kind of reason. It is said that the amount was in the discretion of the Taxing Officer, and that it is a firm rule of the Courts not to allow an appeal in that respect: but a legislative Rule provides that there shall be an appeal, when duly taken, in regard "to any item" in a bill taxed. It is true that if the appeal be as to matters about which a Judge may think the Taxing Officer knows better than he, the appeal is apt to be dismissed: or, if matters of no considerable moment are made the subject of appeal, the appellant is not likely to fare well. Appeals from taxation are troublesome and not much encouraged. But, in such a case as this, an appeal lies, and must be considered. I cannot look upon it as an appeal, in this respect, as much from a discretion exercised as it is from an indiscretion exercised. Nine hundred dollars allowed without even a stroke of a pen of counsel to shew any service rendered: very like \$900 of "luxuries."

Bullen. We offered to pay \$100 in all, for counsel fees, divisible among the nine cases: and are willing to pay that now rather than have this litigation further prolonged.

THE CHIEF JUSTICE:—I cannot perceive how it can be possible for the defendants to shew a right to more than that. At present they have shewn no right to anything, and, if strictly dealt with, the whole of the fees in question should be struck off. In these circumstances, the proper order to make is: that the appellants may have either the items in question struck off the bill with a reference back to the Taxing Officer as to them; or have the \$900 reduced to

Meredith,
C.J.C.P.

1918

FLEXLUME
SIGN CO.
LIMITED

v.
GLOBE
SECURITIES
CO.

App. Div.
1918

FLEXLUME
SIGN CO.
LIMITED
v.
GLOBE
SECURITIES
Co.

\$100 and the taxation ended. They may take out an order in either form.

The plaintiffs elected to have the \$900 reduced to \$100, and an order so directing was issued.

The defendants appealed.

December 9. The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

R. McKay, K.C., for the appellants. The discretion of the Taxing Officer, an experienced man, on the question of quantum, should not be interfered with: *In the Estate of Ogilvie*, [1910] P. 243; *Connec v. North American Railway Contracting Co.* (1890), 13 P.R. 433; *Re Solicitor* (1908), 12 O.W.R. 1074; *Smith v. Harwood* (1895), 17 P.R. 36; *Re Robinson* (1896), 17 P.R. 137; *Rondot v. Monetary Times Printing Co. of Canada* (1898), 18 P.R. 141; *Denison v. Woods* (1899), 18 P.R. 328; *McDonald v. Grand Trunk R.W. Co.* (1911), 2 O.W.N. 748. It was a mere accident that the solicitor and counsel were the same person, and this should make no difference. He was entitled to deliver briefs, and to a counsel fee at trial.

J. M. Bullen, for the plaintiffs, respondents, objected that an appeal did not lie without leave obtained under Rule 507 (2), as the order appealed from was an interlocutory one: *Salaman v. Warner*, [1891] 1 Q.B. 734; *In re Jerome*, [1907] 2 Ch. 145; *In re Watson*, *Ex p. Phillips* (1887), 19 Q.B.D. 234. Upon the merits, he contended that the Court could review the decision of the Taxing Officer on a question of quantum, and might disallow the costs of vexatious or unnecessary proceedings: Halsbury's Laws of England, vol. 26, p. 805. Party and party costs are only an indemnity, not a bonus. The successful party is entitled only to such costs as he is liable to pay his solicitor. Disbursements mean actual payments before delivering the bill. Therefore counsel fees not then paid should be disallowed: *Gundry v. Sainsbury*, [1910] 1 K.B. 645; *Sadd v. Griffin*, [1908] 2 K.B. 510; *Smith v. Buller*, L.R. 19 Eq. 473; *Fox v. Toronto and Nipissing R.W. Co.* (1877), 7 P.R. 157; *Re Robinson* (1895), 16 P.R. 423; *Re Solicitors* (1912), 27 O.L.R. 147, 7 D.L.R. 323. When, as here, the solicitor and counsel were

the same person, there were no such disbursements. All the actions concerned the validity of the same patent. Therefore separate counsel fees and briefs should not have been allowed.

McKay, in reply. This was not an appeal from an interlocutory order, as the order appealed from finally disposed of the right of each defendant to certain costs: *Talbot v. Poole* (1893), 15 P.R.274. Each case stood on its own bottom, and therefore separate counsel fees and separate briefs were rightly allowed.

THE COURT overruled the objection that an appeal did not lie without leave, pointing out that the test whether leave must be obtained for an appeal is not whether the order to be appealed from is "interlocutory" or not, but whether or not it finally disposes of the whole or some part of the matter.* The order of the Chief Justice of the Common Pleas finally disposed of the right of each defendant to receive certain money by way of costs, and therefore the order was appealable without leave. *Talbot v. Poole*, 15 P.R. 274, was approved and followed notwithstanding the change in the law.

THE COURT on the merits held:—

1. That the defendants were justified in setting down their cases for trial and giving notice of trial.

2. That thereupon the solicitor became entitled to deliver briefs to counsel, and, if intending to take his own brief as a barrister, was entitled to a counsel fee at trial.

3. Reaffirming the general rule that the discretion of the Taxing Officer could not be interfered with as to quantum, the Court is not precluded from so interfering in very special circumstances. Here there were such special circumstances:—

(a) The actions were all practically the same and practically the same as the *Macey* case.

(b) The defendants were all represented by the same solicitor.

(c) And this solicitor had been counsel for *Macey* and intended to be counsel in all these actions.

(d) In the *Macey* action he had been taxed a counsel fee of \$750.

* Rule 507.—(1) A person affected by an order or judgment pronounced by a Judge in Chambers which finally disposes of the whole or part of the action or matter may appeal therefrom to a Divisional Court without leave.

App. Div.
1918

FLEXLUME
SIGN CO.
LIMITED

v.
GLOBE
SECURITIES
CO.

(e) No facts or law were briefed, and no facts or law other than appeared in the *Macey* case were required to be considered.

(f) A fee of \$25 in each case was allowed for "Preparation for Trial."

4. As the costs between party and party are the costs of the litigant, each bill of costs is a separate matter; and, each being taxed by itself, a counsel fee should be taxed in each.

5. A counsel fee of \$50 in each case was allowed as "Counsel fee at trial."

The order of the Chief Justice of the Common Pleas was amended accordingly; costs of the appeal, fixed at \$75, to cover all costs of appeal, including order thereon, to be paid by the plaintiffs; no costs of the appeal before the Chief Justice of the Common Pleas.

1918

[APPELLATE DIVISION.]

Dec. 13.

TOWN OF EASTVIEW V. ROMAN CATHOLIC EPISCOPAL CORPORATION
OF OTTAWA.

Cemetery—Use of Land in Town for Cemetery Purposes—Approval of Provincial Board of Health—Agreement between Owner of Land and Town Corporation—Covenant by Owner to Pay Annual Sum to Corporation in Lieu of Taxes—Consideration—Covenant by Corporation never to Prohibit Use of Land for Interment of Dead—Cemetery Act, R.S.O. 1914, ch. 261, sec. 37—Covenant Illegal and Void—Failure of Consideration—Owner's Covenant not Enforceable—Public Policy—Agreement under Seal—Corporation Sole—Suggested Legalisation of Agreement by Legislature.

The defendant was duly authorised by the Provincial Board of Health to use for cemetery purposes certain lands in the town of E. By the Assessment Act, cemetery lands are not liable to assessment and taxation. The defendant corporation entered into an agreement with the Municipal Corporation of the Town of E., the plaintiff, whereby, in consideration of the covenants of the plaintiff and the due authorisation and legalisation thereof by the plaintiff, the defendant covenanted to pay annually to the plaintiff the sum of \$200 in lieu of general taxes, and war tax levy theretofore paid by the defendant in respect of the lands, and whereby, in consideration of the covenants of the defendant, the plaintiff covenanted "to approve and allow forever the use for cemetery purposes of the lands" and "to never attempt to prevent or prohibit interment of the dead in said lands." The agreement was under the corporate seals of both the plaintiff and the defendant, attested by the signature of a clergyman, called "Priest Bursar," as representing the defendant, and those of the mayor and clerk of the town for the plaintiff:—

Held, that, by sec. 37 of the Cemetery Act, R.S.O. 1914, ch. 261, the Legislature conferred on the plaintiff corporation the power in perpetuity of passing by-laws prohibiting the interment of the dead within the municipality, and the corporation could not by any contract divest itself of or abridge

that power; the plaintiff corporation's covenant was, therefore, illegal and void; and, the sole consideration for the defendant corporation's covenant being the unlawful covenant of the plaintiff corporation, the defendant corporation's covenant to pay \$200 a year could not be enforced.

Per RIDDELL, J.—The defendant, that is, the Roman Catholic Bishop of the Diocese of Ottawa, as a corporation sole, was bound by the affixing of the seal without his signature.

Any contract which will interfere with the due exercise of the discretion and judgment of the council of a municipality is against public policy and void. It would be just to allow the plaintiff corporation an opportunity to have the contract legalised by the Legislature.

1918
—
TOWN
OF
EASTVIEW
v.
ROMAN
CATHOLIC
EPISCOPAL
CORPOR-
ATION
OF
OTTAWA.

AN appeal by the defendant corporation from the judgment of the Senior Judge of the County Court of the County of Carleton, in favour of the plaintiff, the Municipal Corporation of the Town of Eastview, in an action for the recovery of \$200, being the amount of the first annual payment alleged to be due under a sealed agreement made between the two corporations, dated the 25th November, 1916, whereby the defendant corporation covenanted to pay \$200 annually to the plaintiff corporation to compensate it for the loss of revenue from taxes upon certain lots of land in the town, which the defendant corporation had, with the consent and approval of the plaintiff corporation, added to a cemetery owned by the defendant corporation—the lots ceasing to be liable to assessment and taxation upon becoming cemetery lots. The defendant corporation alleged that the agreement was *ultra vires*, illegal, and void.

October 24. The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

Wallace Nesbitt, K.C., and *Henri St. Jacques*, for the appellant corporation, argued that the agreement between the parties, and the by-law of the plaintiff corporation approving of the same, were *ultra vires* and invalid, inasmuch as they were contrary to the provisions of the Cemetery Act, R.S.O. 1914, ch. 261, sec. 37, which confers upon the council of every urban municipality the power in perpetuity of passing by-laws prohibiting the interment of the dead within the municipality. No municipal corporation could divest itself of these powers without the sanction of the Legislature. Under the Ontario Act of 1883 relating to the defendant corporation, 46 Vict. ch. 64, sec. 7, the Bishop of the diocese must be a party to any deed by the corporation, and it is submitted that the absence of his signature renders the deed invalid. Refer-

App. Div.
1918
TOWN
OF
EASTVIEW
v.
ROMAN
CATHOLIC
EPISCOPAL
CORPOR-
ATION
OF
OTTAWA.

ence was made to Dillon's Municipal Corporations, 5th ed., pp. 463, 1178-1182; *Brick Presbyterian Church v. City of New York* (1826), 5 Cowen 538; *City of Indianapolis v. Indianapolis Gas Light & Coke Co.* (1879), 66 Ind. 396, 404; *Great Western Railway and Midland Railway v. Bristol Corporation* (1918), 87 L.J. Ch. 414, 418; *Ayr Harbour Trustees v. Oswald* (1883), 8 App. Cas. 623; *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L.R. 7 H.L. 653, 670; *Ottawa Electric Light Co. v. City of Ottawa* (1906), 12 O.L.R. 290, 299. It is the policy of the Legislature that cemeteries should not be subject to taxation, and this agreement is in opposition to that policy. Parol evidence was wrongly admitted by the trial Judge to prove the consideration.

W. A. Armstrong, for the plaintiff corporation, respondent, referred, upon the question of the admission of parol evidence, to Halsbury's Laws of England, vol. 8, p. 446, para. 784, and the cases there cited of *Frith v. Frith*, [1906] A.C. 254, 259, and *Clifford v. Turrell* (1841), 1 Y. & C. Ch. 138. He also referred to Dillon, *op. cit.*, pp. 920, 1033; *City of New Orleans v. St. Louis Church* (1856), 11 La. Ann. R. 244, there distinguished from the *Presbyterian Church* case, *supra*; *Hume v. Laurel Hill Cemetery* (1905), 142 Fed. Repr. 552; Leake on Contracts, 6th ed., p. 517; *In re South-Eastern Railway and Wiffen's Contract* (1907), 76 L.J. Ch. 481. The section cited from the Act of 1883 with reference to the absence of the Bishop's signature does not apply to the present case.

Nesbitt, in reply.

December 13. MULOCK, C.J. Ex.:—This is an appeal from the judgment of His Honour the Judge of the County Court of the County of Carleton.

The facts are as follows:—

The defendant corporation owned the Notre Dame Cemetery, which adjoins the municipality of the plaintiff corporation, and also a number of lots intersected by streets within the limits of the town, and desired to enlarge the cemetery by the addition thereto of the lots and the streets in question. To that end, it entered into negotiations with the plaintiff corporation, when it was arranged between the two corporations that the municipal corporation would consent to the closing of the streets and the enlargement of the cemetery by the addition thereto of the said lots and streets when

closed, and would, through the Local Board of Health of Eastview, petition the Provincial Board of Health to approve of such enlargement of the cemetery, in consideration of which the defendant corporation, upon such enlargement of the cemetery, was to pay to the municipal corporation the annual sum of \$200 in lieu of the general taxes and war tax levy which the defendant corporation had theretofore paid in respect of the said lots.

In furtherance of this arrangement, the County Court Judge, on application of the defendant corporation, and with the approval of the plaintiff corporation, on the 30th October, 1916, made an order closing the said streets, and the Local Board of Health of the town petitioned the Provincial Board of Health to approve of the enlargement of the cemetery in manner aforesaid; and, on the application of the defendant corporation, the Provincial Board of Health, by order bearing date the 10th November, 1916, approved of the application and ordered that the said cemetery be 'established, enlarged, and extended upon and to include' the said lots and the lands representing the closed streets. Thereupon the said lands, having become cemetery lands, ceased to be liable to assessment and taxation, and by way of compensation to the municipal corporation for such loss of revenue, and in pursuance of the understanding and arrangement between the two corporations, the following agreement was entered into between them:—

"This indenture made the 25th day of November A.D. 1916 between the Roman Catholic Episcopal Corporation of Ottawa hereinafter called the 'Episcopal Corporation' of the first part and the Municipal Corporation of the Town of Eastview hereinafter called the 'Municipal Corporation' of the second part:—

"Whereas the Episcopal Corporation is duly authorised by the Provincial Board of Health to use for cemetery purposes the lands hereinafter described:

"And whereas the said lands being cemetery lands are by virtue of the provisions of the Assessment Act not liable to assessment and taxation:

"And whereas with reference to said lands the parties hereto have mutually agreed as hereinafter set forth:

"Now therefore this indenture witnesseth that in consideration of the covenants of the Municipal Corporation hereinafter contained and the due authorisation and legalisation thereof by the Municipal

App. Div.
1918

TOWN
OF
EASTVIEW
v.
ROMAN
CATHOLIC
EPISCOPAL
CORPORATION
OF
OTTAWA.

Mulock, C.J.Ex.

App. Div.
1918

TOWN
OF

EASTVIEW
v.

ROMAN
CATHOLIC
EPISCOPAL
CORPOR-
ATION
OF

OTTAWA.

Mulock, C.J.Ex.

Corporation the Episcopal Corporation covenants and agrees to pay annually to the Municipal Corporation the sum of \$200 in lieu of general taxes and war tax levy heretofore paid by the Episcopal Corporation in respect of the lands hereinafter described:

"This indenture further witnesseth that in consideration of the covenants of the Episcopal Corporation herein set forth the Municipal Corporation of the Town of Eastview covenants and agrees to approve and allow forever the use for cemetery purposes of the lands hereinafter described and to never attempt to prevent or prohibit interment of the dead in said lands which said lands may be known and described as follows:"

(Here follows a description of the lands).

"And the parties hereto further agree and declare that this agreement shall not be assignable by either without leave of the other in writing.

"In witness whereof the respective Corporations have hereunto affixed their corporate seals attested by the hands of their proper officers in that behalf duly authorised:

"Signed sealed and delivered	{	The Roman Catholic Episcopal
"In the presence of		Corporation of Ottawa,
		Eudore Theriault,
J. Ernest Caldwell		Priest Bursar.
		(Corporate seal)
		J. H. White,
		Mayor.
		Henry R. Washington,
		Town Clerk."

(Corporate seal)

When the first annual payment of \$200 became by the language of the agreement payable, the defendant corporation refused to pay the same, whereupon this action was brought for its recovery, and the learned County Court Judge directed judgment for the amount, and this appeal is from such judgment.

Amongst other defences the defendant corporation contends that the agreement in question was *ultra vires* of the defendant corporation, or, if *intra vires*, was illegal and void because the same was for the purpose of taxation and revenue, and not for that of protecting the health, safety, morality, and welfare of the inhabitants of the municipality. By this agreement the plaintiff

corporation covenanted "to approve and allow forever the use for cemetery purposes of the lands hereinafter described and to never attempt to prevent or prohibit the interment of the dead in said lands."

The Cemetery Act, R.S.O. 1914, ch. 261, sec. 37, enacts as follows:—

"The council of every urban municipality and the trustees of every police village may pass by-laws for prohibiting the interment of the dead within the municipality or police village."

By this section, the Legislature conferred on the plaintiff corporation the power in perpetuity of passing by-laws prohibiting the interment of the dead within the municipality, and therefore the corporation is unable by any contract to divest itself of such powers or to abridge them. They were entrusted to it for the public good, and the municipality must always be in a position to exercise them when the public interest so requires.

If the plaintiff corporation were able to contract itself out of such powers, such a contract would be equivalent to amending the legislation which created them. Obviously the municipality, the creature of the Legislature, cannot, unless so authorised by the Legislature, vary its legislation. I therefore am of opinion that the covenant in question is illegal and void: *Ayr Harbour Trustees v. Oswald*, 8 App. Cas. 623; *Montreal Park and Island R.W. Co. v. Chateauguay and Northern R.W. Co.* (1904), 35 Can. S.C.R. 48, 58.

The question then arises whether the covenant of the defendant corporation to pay the annual sum of \$200 is valid. The agreement in question being under seal, no other consideration is necessary; but if, nevertheless, there in fact be one, it must be a lawful one. The agreement shews that the sole consideration for the defendant corporation's covenant was the unlawful one of the plaintiff corporation. Transgression of the law cannot give the transgressor a cause of action. No action would lie against the plaintiff corporation because of breach of its unlawful covenant; neither can it maintain an action against its covenantee on a covenant wholly induced by unlawful consideration.

For these reasons, I am, with respect, of opinion that the learned trial Judge did not rightly determine this case, and that his judgment should be set aside, and this appeal allowed and the action dismissed, but without costs.

App. Div.
1918

TOWN
OF
EASTVIEW
v.
ROMAN
CATHOLIC
EPISCOPAL
CORPORATION
OF
OTTAWA.

Mulock, C.J.Ex.

App. Div.
1918

TOWN
OF
EASTVIEW
v.
ROMAN
CATHOLIC
EPISCOPAL
CORPOR-
ATION
OF
OTTAWA.
Riddell, J.

CLUTE and SUTHERLAND, JJ., agreed with MULOCK, C.J. Ex.

RIDDELL, J.:—The Roman Catholic Bishop of the Diocese of Ottawa is, by virtue of the Acts (1849) 12 Vict. ch. 136 (Can.) and (1861) 24 Vict. ch. 128 (Can.), a body corporate under the name of "The Roman Catholic Episcopal Corporation of Ottawa." To make the rights of the corporation within this Province clear, the Act (1883) 46 Vict. ch. 64 (Ont.) was passed. One of the objects of the Legislature was to vest the title to the temporalities of the Church in the diocese in the corporation and to enable the corporation to deal with them.

In 1910 the defendant had considerable land in the village (now town) of Eastview and certain land adjoining; on the adjoining land was a cemetery—Notre Dame Cemetery—and it was desired to increase its area by taking in some of the land within the town, some 25 acres. Upon this land there were two streets at least laid down on the registered plan, and (the clerk of the town says) they were open.

The solicitor for the defendant on the 24th September, 1910, wrote asking the village corporation to close these streets; he said: "I think these streets or these parts of streets have never been used as public streets nor opened as such, although they are mentioned in the plan. I ask you on behalf of the Roman Catholic Episcopal Corporation, the owner of all the lots and other lands abutting on these streets . . . what condition would you require to have the by-law passed and adopted by your council?" The council declined to accede to the request, but passed a resolution: "In the matter of cemetery extension, be it decided that the present limits of the cemetery shall remain intact, and the clerk be instructed to inform Father Campeau that the said streets shall be kept open." (Father Campeau was the local parish priest.)

The project lay in abeyance for some years, but in 1916 it was again mooted.

Two representatives of the defendant, on the 27th October, 1916, attended the council and asked the council not to oppose the closing up of the streets, saying that they were going to apply to the Local and Provincial Boards of Health to allow the lands around these streets to be made into a cemetery, and were willing to enter into an agreement to pay a yearly sum in lieu of taxes, to offset

what the town would lose in revenue. On this condition the council agreed not to oppose an application to be made by the defendant to have the streets closed. Thereupon notice of an application under the Registry Act, R.S.O. 1914, ch. 124, sec. 86, was served by the Episcopal Corporation upon the town corporation; this was not opposed by the town corporation, and an order was made by the County Court Judge under the said Act. At this time the town had street lights on the streets in question, and the defendant undertook to pay for them until they could be removed.

On the 6th November, 1916, the defendant petitioned the Local Board of Health to approve the land as a cemetery and to transmit the application so approved to the Provincial Board of Health (Cemetery Act, R.S.O. 1914, ch. 261, secs. 3, 4, 5). The petition expressly states that the application "is made on the representation that the petitioner will, upon the approval of the applicant" (*sic*—of course "application"), "be bound by agreement with the Municipal Corporation of the Town of Eastview to pay annually a sum equivalent to the present annual general and war taxes chargeable against said lands."

The Local Board gave the opinion required by sec. 5 of the Cemetery Act, approving the petition, and saying "that no public or private rights would by the said enlargement of said cemetery be impaired or infringed;" and sent the petition on to the Provincial Board (sec. 5.) The Provincial Board approved, ordering (10th November, 1916), that the "cemetery may be established, enlarged, and extended . . ."

Before this, however, a draft agreement and by-law had been drawn up by the defendant's solicitor; upon this being submitted to the town's solicitor, he expressed the opinion to his clients that if the agreement were "tested out in an action it would be held . . . beyond the powers of either of the parties . . . that the performance of the terms of the agreement must be regarded as a moral rather than a legal obligation," and that the town must rely "solely on the good faith of the Episcopal Corporation to carry it out," but he approved the form.

On the 16th November, representatives of the Episcopal Corporation appeared before the council with the draft agreement and by-law approving it—the by-law, No. 261, was passed the same

App. Div.
1918

TOWN
OF
EASTVIEW
v.
ROMAN
CATHOLIC
EPISCOPAL
CORPORATION
OF
OTTAWA.
Riddell, J.

App. Div.
1918

TOWN
OF
EASTVIEW
v.
ROMAN
CATHOLIC
EPISCOPAL
CORPOR-
ATION
OF
OTTAWA.

Riddell, J.

day, approving the agreement, which is made a schedule to the by-law.

The defendant seems to have executed the agreement (in a manner to be considered later), but the town to have delayed—for on the 23rd November the solicitors for the defendant complain that “it has not yet been executed by the officers of the municipal corporation.”

It was, however, executed on the 25th November by the town corporation. The agreement is called an indenture, is under seal, and, after reciting that the defendant is duly authorised to use the lands mentioned for cemetery purposes, and that these lands are, as cemetery lands, not liable to taxation, the “indenture witnesseth that in consideration of the covenants of the Municipal Corporation hereinafter contained and the due authorisation and legalisation thereof by the Municipal Corporation the Episcopal Corporation covenants and agrees to pay annually to the Municipal Corporation the sum of \$200 in lieu of general taxes and war tax levy heretofore paid by the Episcopal Corporation in respect to the lands hereinafter described:

“This indenture further witnesseth that in consideration of the covenants of the Episcopal Corporation herein set forth the Municipal Corporation of the Town of Eastview covenants and agrees to approve and allow forever the use for cemetery purposes of the lands hereinafter described and to never attempt to prevent or prohibit interment of the dead in said lands. . . .”

The taxes had been \$476, but the council, after first suggesting \$300, agreed to take \$200.

The defendant then applied to the Legislature and procured the Act (1917) 7 Geo. V. ch. 100, which applied the Cemetery Act to this cemetery, “save as is herein otherwise specially enacted,” and enacted that “it shall be lawful for the said Corporation to hold and use for cemetery purposes and for the extension of Notre Dame Cemetery, and to make and allow interment of the dead at all times hereafter in the” said lands and a few other lots. The town corporation had no official notice of the application for this Act.

A short time afterwards, the solicitor for the defendant wrote to the clerk of the town—referring to the approval of the cemetery by the Local and Provincial Boards of Health and to the agreement whereby the town corporation agreed not to pass by-laws prohibit-

ing the interment of the dead in the land described, in consideration of which the Roman Catholic Episcopal Corporation would pay \$200 annually in lieu of taxes thereon—"You will note that this agreement says that your municipality will never attempt to prevent or prohibit interment of the dead in the said lands. All the rights which you might have derived under this agreement have been forfeited by the conduct of the municipal council, and also by an Act of Parliament assented to on the 12th of April, 1917, and which can be found in 7 Geo. V. ch. 100. By this Act your rights to pass by-laws in reference to these lands have also come to an end. Therefore the Roman Catholic Episcopal Corporation offers to pay you under this agreement a proportion of the \$200 which is to be calculated from the 25th of November to the date of the passing of the bill."

There is no pretence that any act of the council did in fact violate this agreement in any way, and the clerk wrote a reply to that effect. The solicitor served a formal notice that the lands were exempt from taxation from the 12th April, 1917. The town demanded payment of \$200. The solicitor, on the 6th December, presumes that the sum will not be due till the 31st December. The amount was not paid. A writ was issued on the 4th February, specially endorsed.

The defendant alleges that the contract is not valid as being: (1) *ultra vires* the defendant; and (2) also *ultra vires* the plaintiff; (3) illegal as an evasion of the Assessment Act, sec. 5 (2); and (4) the Cemetery Act; (5) not entered into in good faith; (6) an invasion of the private rights of the defendant by reason of the Assessment Act, R.S.O. 1914, ch. 195, sec. 5 (2), and the order of the Provincial Board of Health; (7) the defendant also pleads the statute (1917) 7 Geo. V. ch. 100; (8) that the plaintiff never legalised the covenants; (9) but has several times attempted to prohibit the interment of the dead; (10) and in any case the defendant has been over-assessed. It is not pleaded that the contract or agreement was not properly or validly executed if within the powers of the defendant; but that claim is made before us for the first time.

The case went to trial before the Judge of the County Court of the County of Carleton, and resulted in a judgment for the plaintiff for \$200 and costs. The defendant now appeals.

App. Div.
1918

TOWN
OF
EASTVIEW
v.
ROMAN
CATHOLIC
EPISCOPAL
CORPOR-
ATION
OF
OTTAWA.
Riddell, J.

App. Div.
1918

TOWN
OF
EASTVIEW
v.
ROMAN
CATHOLIC
EPISCOPAL
CORPOR-
ATION
OF
OTTAWA.

Riddell, J.

Upon the appeal, for the first time, a defence is taken which it is not possible to suppose could have been authorised by the Right Reverend Prelate ostensibly in whose name and on whose behalf it is taken. The negotiations for the contract were conducted on behalf of the defendant by two persons, one of whom was Father Theriault; the contract was drawn up by the solicitor for the defendant; the defendant delivered the contract (to which the official seal was affixed) as being the deed of the defendant; the solicitor for the defendant wrote on the 23rd November, 1916, complaining of the non-execution by the town. The present solicitor for the defendant wrote on the 10th July, 1917, asserting the existence of the contract, but contended that it had no validity to compel the payment of taxes after the passing of the Act of 1917, 7 Geo. V. ch. 100, and offered to pay a proportionate part. A very long and full affidavit of defence is put in (as statement of defence) setting up the grounds for alleging that the contract is not binding, and no such ground is there taken; but on this appeal it is urged that the contract is not binding on the defendant because opposite the official seal of the defendant is placed the name "The Roman Catholic Episcopal Corporation of Ottawa, Eudore Theriault, Priest Bursar," instead of the name (or signature) of the Bishop

Were it necessary, in order to defeat this extraordinary defence, to refuse to allow the pleadings to be amended, I think we should do so—fortunately it is not necessary.

The Incorporation Act of 1849, 12 Vict. ch. 136, makes the Bishop of the diocese a body corporate with perpetual succession and a common seal, with power to acquire, hold, etc., "lands, tenements or hereditaments" for "religious, eleemosynary, ecclesiastical or educational purposes," the Act to extend only to Lower Canada (except as to acquiring, holding, etc., lands in Upper Canada). The wording of sec. 10 is obscure, but it has been interpreted by the Ontario Act (1883) 46 Vict. ch. 64, preamble. The original Act provided for alienation etc. by deed, on the face of which was to appear "the consent" of certain ecclesiastical dignitaries.

The Act of 1861, 24 Vict. ch. 128, simply changes the name, and it requires no further notice. The Ontario Act of 1883, 46 Vict. ch. 64, gave power to the corporation to acquire, hold, etc., "lands,

tenements or hereditaments" in the diocese, "for the general uses and purposes eleemosynary, ecclesiastical or educational, of the said diocese or of any portion thereof;" sec. 7 provides that it shall be lawful for the Bishop in the name of the corporation "to make or execute any deed, conveyance, mortgage, etc., of the whole, or any part of the lands, tenements or hereditaments acquired or held . . . under and by virtue of the said Acts or of this Act," with the consent of certain ecclesiastical dignitaries specified; and sec. 13 provides that, for the purposes of the corporation, "deeds or conveyances in the form and with the recitals as set out in schedule A . . . may as to real estate within Ontario be used" The form contemplates two credible witnesses, also the seal of the defendant corporation and the seals of the consenting dignitaries, "the seal of said corporation being affixed by the party of the third part," i.e., the Bishop of Ottawa—sec. 7 requiring the signature of the Bishop.

It is argued that, because the name of the Bishop is not written opposite the seal of the corporation, the contract is void; being under seal, it is a "deed," and the Bishop should have affixed the seal.

The argument is noticed here only because of the apparent earnestness with which it was urged; there are several answers, any one of which is fatal to the contention. One will suffice.

While in technical language any document under seal—and therefore this document—is a "deed," the word "deed" is most frequently used in the popular sense of a conveyance of real estate (sec. 13). The deed or conveyance is a deed or conveyance of real estate within Ontario, and the schedule indicates that it would come within one of the Short Forms Acts. The present contract has nothing to do with real estate; so far as the corporation is concerned, it is a personal promise to pay money, enforceable, if at all, only in a personal action against the corporation. There is no necessary invalidity of the contract at the common law. A corporation sole does not need a seal at all, and there is at the common law no necessity for such a corporation making its contracts under seal: Bl., Comm., bk. 1, p. 476.

If a corporation have a common seal, as the defendant is enabled by statute to have, the affixing of the seal alone without any signature is sufficient if delivery takes place: *Dartford Union Guardians*

App. Div.
1918

TOWN
OF
EASTVIEW
v.
ROMAN
CATHOLIC
EPISCOPAL
CORPOR-
ATION
OF
OTTAWA.
Riddell, J.

App. Div.
1918

TOWN
OF
EASTVIEW
v.
ROMAN
CATHOLIC
EPISCOPAL
CORPOR-
ATION
OF
OTTAWA.

Riddell, J.

of the Poor v. Trickett (1888), 59 L.T.R. 754—of course there must be delivery: *Derby Canal Co. v. Wilmot* (1808), 9 East 360.

The Statute of Frauds is not pleaded, and it should not be allowed to be pleaded to effect what would virtually be a fraud. Even if it were pleaded or an amendment allowed, the defence could not avail. Where the seal of a corporation is affixed to a contract made by the corporation, it has the same effect as the signature of an individual. "In truth and fact the affixing of a seal by a corporation is for all contracting purposes the same thing as the signature of an ordinary individual:" *per* Pollock, B., in *Dartford Union Guardians of the Poor v. Trickett*, 59 L.T.R. at p. 757; *South Yorkshire Railway and River Dun Co. v. Great Northern R.W. Co.* (1853), 9 Ex. 55, at p. 84, *per* Parke, B.; *Bateman v. Mayor of Ashton-under-Lyne* (1858), 3 H. & N. 323, at p. 335, *per* Martin, B.

Whether in the case of an ordinary individual a seal is sufficient without signature to answer the Statute of Frauds has been somewhat canvassed—Blackstone, Comm., bk. 2, p. 306, thought not; Stephen, Comm., bk. 2, part 1, p. 292, doubts; Chitty, Contracts, 16th ed., p. 93, thinks Blackstone's view sound, though he admits that both Judges and text-writers (except Blackstone) have inclined more or less strongly in favour of the sufficiency: Williams, Real Property, 20th ed., p. 154; Leake, Contracts, 6th ed., p. 90; Addison, Contracts, 11th ed., p. 19; Pollock, Contracts, 7th ed., p. 165; Foa, Landlord and Tenant, 4th ed., p. 10. The cases are: *Aveline v. Whisson* (1842), 4 M. & G. 801; *Cooch v. Goodman* (1842), 2 Q.B. 580; *Cherry v. Heming* (1849), 4 Ex. 631, *per* Parke, Alderson, and Rolfe, BB. The previous case of *Pitman v. Woodbury* (1848), 3 Ex. 4, is not really adverse to this view.

The seal is witnessed in the present case by a priest, and we must presume it was affixed by competent authority—"Omnia præsumuntur rite acta esse"—and every one dealing with a corporation has the right to consider a seal on an instrument coming from the corporation to have been properly set thereto. And in any case it was explicitly affirmed by the defendant, acting through its solicitor.

The real defence to the action is the incapacity of the town corporation to enter into such a contract.

I do not investigate the right of a party to a contract to prove

a consideration dehors the instrument—the cases are numerous and substantially in accord. The case of *Great Western Railway and Midland Railway v. Bristol Corporation*, in the House of Lords (1918), 87 L.J. Ch. 414, by no means supports the proposition for which it was cited, being a case of the interpretation of the terms of a contract, i.e., the obligations laid upon one party or the other, not of the proof of a consideration not mentioned in the writing. It is unnecessary to express any opinion in this case; the consideration given by the town corporation at least includes the consideration expressed in the contract; that consideration is an indispensable part of the contract, and if that is illegal the contract cannot be sustained: *Featherston v. Hutchinson* (1590), 1 Cro. Eliz. 199; *Rex v. Inhabitants of Northwingsfield* (1831), 1 B. & Ad. 912; *Waite v. Jones* (1835), 1 Bing. N.C. 656, at p. 662; *Shackell v. Rosier* (1836), 2 Bing. N.C. 634; *Lound v. Grimwade* (1888), 39 Ch.D. 605; *Leggatt v. Brown* (1898-9), 29 O.R. 530, 30 O.R. 225.

The defendant wished this land for a burying ground, for use as a burying ground so long as it might be needed as such; and a by-law of the town under R.S.O. 1914, ch. 261, sec. 37, while it would or might not prevent the land from continuing to be a "cemetery" (see the definition, sec. 2 (a)), would operate to prevent the object for which the land was intended to be used.

An essential part of the consideration for the promise of the defendant to pay \$200 per annum being the agreement of the town never to attempt to prevent or prohibit interment of the dead in the said lands, if this agreement on the part of the town is illegal, the contract is void.

That in our system of government any contract whereby the freedom of action of a representative in Parliament is interfered with, is void, cannot be doubted: *Lord Howden v. Simpson* (1839), 10 A. & E. 793, Cam. Scacc., especially at pp. 820 and 821; affirmed in Dom. Proc., *Simpson v. Lord Howden* (1842), 10 Cl. & F. 61; *Earl of Shrewsbury v. North Staffordshire R.W. Co.* (1865), L.R. 1 Eq. 593, especially at p. 613; *Osborne v. Amalgamated Society of Railway Servants* (1908), 25 Times L.R. 107 (C.A.); affirmed in Dom. Proc., *Amalgamated Society of Railway Servants v. Osborne*, [1910] A.C. 87, especially at pp. 99, 110, 111, 112, 114, 115.

Our municipal councils are just as truly legislative bodies

App. Div.
1918
TOWN
OF
EASTVIEW
v.
ROMAN
CATHOLIC
EPISCOPAL
CORPOR-
ATION
OF
OTTAWA.
Riddell, J.

App. Div.
1918
—
TOWN
OF
EASTVIEW
v.
ROMAN
CATHOLIC
EPISCOPAL
CORPOR-
ATION
OF
OTTAWA.
—
Riddell, J.

within the ambit of their jurisdiction as Parliament or the Legislature; and any contract which would interfere with the due exercise of the discretion and judgment of a member of such a council must equally be void as against public policy. Public office is a public trust, not a means of personal aggrandisement; nothing should be allowed to interfere with the honest judgment of a councillor, whether it be a persistence in or a change of opinion.

The same reasoning applies to a whole council. "Powers are conferred upon municipal corporations for public purposes; and . . . their legislative powers . . . cannot without legislative authority, express or implied, be bargained or bartered away." Dillon, *Municipal Corporations*, 5th ed., vol. 1, p. 463, sec. 245—the learned author continues: "Such corporations may make authorised contracts, but they have no implied power . . . to make contracts . . . which shall . . . control or embarrass their legislative or governmental powers . . ."

Neither Parliament nor Legislature can validly bind itself not to pass any kind of legislation—"the Legislature has no power to control by anticipation the actions of any future Legislature or of itself:" *Smith v. City of London* (1909), 20 O.L.R. 133, at p. 142. In some cases express power is given to municipal corporations to bind themselves by a contract not wholly unlike the present, e.g., with street railway companies, R.S.O. 1914, ch. 185, sec. 231; telephone companies, R.S.O. 1914, ch. 188, sec. 8; for light, heat, and power, R.S.O. 1914, ch. 192, sec. 513 (b), etc., etc.; but there is no power given to the municipal corporation to bind itself not to prohibit the burial of the dead within the municipality. The implication of powers not expressly given has been jealously watched in this Province from the time of *Cornwall v. Township of West Nissouri* (1875), 25 U.C.C.P. 9, and before: *Ottawa Electric Light Co. v. City of Ottawa* (1906), 12 O.L.R. 290, especially at p. 299—"Any fair reasonable doubt concerning the existence of power is resolved by the Courts against the corporation, and the power is denied."

It must be held, I think, that the Legislature intended that the successive municipal councils must keep an open mind and judge of the propriety or necessity of a by-law under sec. 37 of the Cemeteries Act, R.S.O. 1914, ch. 261, from time to time according to the needs of the town and its inhabitants. Consequently the

agreement not to pass such a by-law was "against the policy of the Act," and therefore void. As a consideration it is not only void, because were it only void it would be simply no consideration, and the contract, being under seal, would still be enforceable: *Gray v. Mathias* (1800), 5 Ves. 286; but it is illegal and therefore voids the whole agreement—*cf.* the cases where contracts were held void as being against the policy of the Bankruptcy Acts and the Acts relating to champerty and maintenance, etc.: Leake, 6th ed., pp. 523, 524, and 562.

In view of this finding, it is unnecessary to express an opinion as to the powers of the defendant, a corporation formed apparently to deal with real estate and given powers accordingly, to enter into such a contract—it may well be that the contract, being made to ensure the temporal enjoyment in the way desired of real estate in Ontario, may be held within these powers—but I express no decided opinion.

The contract sued upon is, in my opinion, wholly void, and the plaintiff town corporation has no claim under it.

I do not, however, think we should now dispose of the case adversely to the town corporation. The permission to form this land into a cemetery was obtained on the representation by the defendant that the Episcopal Corporation would "be bound by agreement with the Municipal Corporation of the Town of Eastview to pay annually a sum of money equivalent to the present annual general and war taxes chargeable against said lands," and the present agreement was prepared by the defendant and delivered as the agreement by which it was bound. It would be unjust to allow the defendant to have the advantage of the acquiescence of the town corporation without paying the amount agreed upon. The town corporation is not without fault; it had been advised by its solicitor that the agreement was not legally binding; and, although part of the consideration for the covenant of the corporation was "the due authorisation and legalisation" of the contract by the Municipal Corporation," no steps were taken to legalise the contract.

The council, unless it was careless, perverse, or wilfully blind, should have known that this means "legislation" by the only authority from which legalisation could be obtained, the Provincial Legislature, procured by the municipal corporation. No appli-

App. Div.
1918

TOWN
OF
EASTVIEW
v.
ROMAN
CATHOLIC
EPISCOPAL
CORPORATION
OF
OTTAWA.

Riddell, J.

App. Div.
1918

TOWN
OF
EASTVIEW
v.
ROMAN
CATHOLIC
EPISCOPAL
CORPOR-
ATION
OF
OTTAWA.

Riddell, J.

cation seems to have been made to the Legislature, and the council kept the power in its own hands at any time to destroy the usefulness of this land for cemetery purposes.

It is not to be wondered at that the defendant declined to continue to be at the mercy of a council, and consequently applied to the Legislature for a private Act ensuring its rights in perpetuity. We are not informed whether the agreement on the part of the corporation to pay \$200 per annum was used upon the application to the Legislature; the presumption is that it was.

The attention of the council was called to the arrangement with the defendant. We find that, after the Act of 1917 was obtained, a petition, signed by some ratepayers, was presented to the council, to take steps to prohibit the interment of the dead in Eastview, and the council considered the matter, ultimately throwing out the petition, the following being the official note of the proceedings:—

“That the clerk be instructed to prepare a by-law for next meeting to prohibit the interment of dead in Eastview—motion lost June 4th, 1917.”

Even then the town took no steps to legalise the contract, but took action upon it as it stood.

I think the town has failed in a most important part of the consideration, but no time is fixed for the legalisation; and it would be just to allow the town an opportunity to have the contract legalised by the Legislature. Unless and until such legalisation is effected, the contract cannot stand.

Under all the circumstances of the case, it is not to be expected that the defendant will object to an Act for that purpose, but rather assist to have the contract binding upon itself as well; we cannot, however, bind either defendant or Legislature.

I would retain the present appeal a sufficient time to allow the town to apply to the Legislature for an Act validating the contract—if the town omit to apply or fail to procure such Act, the appeal should be allowed and the action dismissed; it is not a case for costs.

Unless there be some legislative adjustment or some settlement between the parties, interesting and difficult questions may arise as to the ownership of the fee in the streets, etc., etc. The parties will probably be well advised to have their rights declared by statute.

Appeal allowed.

[APPELLATE DIVISION.]

ANDERSON V. TOWNSHIPS OF ROCHESTER AND MERSEA.

1918

Dec. 17.

1919

Feb. 21.

Highway—Nonrepair—Ditch Running alongside of Travelled Road for 50 Miles—Ditch Constructed under Authority of Municipal Drainage Act—Duty of Township Corporations Responsible for Safety of Travel upon Road—Absence of Fence or Guard-rail—Clay Road—Failure to Shew Negligence in Maintenance—Motor-vehicle on Highway Sliding into Ditch and Causing Death of Passenger—Proximate Cause—Negligence of Owner-driver—Evidence.

Along the side of a highway, the boundary between two townships, an open ditch or drain had been constructed, at the instance of the residents in an adjoining township, for the purpose of draining lands in that township. The drain was not a municipal work undertaken by the two township corporations; it was constructed upon the highway under the authority of the Municipal Drainage Act; it ran alongside the highway for more than 50 miles:—

Held, that the two township corporations, while subject to the obligation of keeping the road reasonably safe for travel, were not bound to erect and maintain a fence or guard-rail along the course of the drain. It could not be said that there was negligence in the maintenance of the road, which was an average country road, the bed composed of clay.

Held, also, upon the evidence, that the proximate cause of the plaintiff's automobile skidding and sliding on the clay to the side of the road (as travelled) and the wheels going into the ditch, so causing the overturning of the vehicle and the death of the plaintiff's wife, was the negligence of the plaintiff himself, who was the driver.

Judgment of MIDDLETON, J., affirmed.

ACTION for damages for the death of the plaintiff's wife in an automobile accident, caused, as the plaintiff alleged, by the negligence of the defendants in regard to the condition of a highway forming the boundary between the two townships.

November 28. The action was tried by MIDDLETON, J., without a jury, at Sandwich.

T. Mercer Morton, for the plaintiff.

J. H. Rodd, for the defendants.

December 17. MIDDLETON, J.:—This is an action arising out of an accident by reason of an automobile upon a highway, in which the wife of the plaintiff was killed. He now sues the Corporations of the Townships of Mersea and Rochester for damages for her death.

The plaintiff was driving a heavy car along the road, with his wife, her brother and sister, and some children, on the 30th June, 1918, about midday, when it started to rain and soon rained very

Middleton, J.

1918

ANDERSON
v.
TOWNSHIPS
OF
ROCHESTER
AND
MERSEA.

heavily. He was about to turn into the premises of Mr. Desmarais for shelter, when his car skidded and slid on the clay to the side of the road (as travelled) and the wheels going into the ditch the car overturned and the wife was instantly killed.

The road was the boundary between the two townships now sued. A drain had been constructed along the road, at the instance of the residents in the adjoining township of Gosfield, for the purpose of draining lands in that township, and its sole function was to afford the waters from Gosfield an outlet in Silver creek, a stream crossing Mersea and Rochester. This drain was constructed under the sanction of the law and under the supervision of a competent engineer, over whom the townships had no jurisdiction, and the use thus made of the highway was an abnormal use, permitted and approved by the Legislature having jurisdiction in the premises.

The ditch was necessarily wide and deep to carry the water to the outlet, and manifestly any one who left the travelled way and fell into the ditch might sustain injury.

The road ran beside the ditch, and was formed of the natural clay, graded and kept in fair condition. The crown of the road was 11 inches—somewhat less than the height necessary under the requirements of the regulations made under the Ontario statute for “Good Roads.”*

So far as the road itself is concerned, it is admitted that there was no negligence. What is contended is that the absence of an adequate guard or fence along the course of the ditch was such negligence as to create liability in the circumstances, and that the accident was caused by this negligence. The defendants not only deny their liability but also contend that the accident was the fault of the plaintiff.

Much might be said as to the provision of the Motor Vehicles Act, R.S.O. 1914, ch. 207, sec. 23, casting the onus upon the operator of a motor vehicle whenever an accident occurs upon a highway, but I propose to deal with this case quite apart from that statute.

The situation here was in no sense a concealed trap; the drain was quite obvious and known to the plaintiff. Miss Desmarais saw the car coming down the road and went out to call to the

*See the Highway Improvement Act, R.S.O. 1914, ch. 40, sec. 6.

driver to turn in at her father's barn, because she recognised his peril, as the car was slipping about on the road. A heavy car on a clay road when it is wet is most dangerous, owing to the fact that the wet clay affords no grip for the rubber tires. Chains are a great aid in preventing skidding of the car—not so much from the prevention of the sideward motion as by giving a forward motion, which permits a driver of skill and experience to counteract an incipient skid.

This heavy car without chains on the wheels required most cautious and skilful handling to make the turn into Desmarais' lane. The approach to the lane was wide enough to permit an easy entrance. What the plaintiff did was to depart from the crest of the road so as to make the turn a wider curve, and it was at this moment the fatal skid occurred. Had he slackened his speed earlier and remained on the crown the accident would not have occurred. He probably was going at a greater speed than he knew, or did not realise how nearly he should have brought the car to a standstill before turning upon a road with a surface so slippery that it might be said there was no aid from friction. Had he reduced his speed sufficiently to make the turn safely, he would not have turned toward the ditch before entering the lane. In any case, having regard to the condition of the road and the car, it was most imprudent to have left the crown of the road. Another factor of some importance was the loose steering gear. The effect of this was that when the car swung from side to side there could not be immediate action to counteract the swing, and the car upon a bad road would swing and would not at any moment be in perfect control. The plaintiff had not much experience, and, while he could run a car well enough upon a good road and under favourable circumstances, on this road and under the circumstances which existed and which undoubtedly called for care and experience in handling a car, he proved inadequate.

The proximate cause of the accident was, in my view, the plaintiff's omission to do the things which, under the circumstances, he ought to have done, and his doing the things he ought not to have done; this in law being negligence.

I do not think I ought to omit stating my views as to the alleged negligence of the defendants. The ditch along the road, it is said, ought to have been fenced. A fence that would prevent a

Middleton, J.
1918
ANDERSON
v.
TOWNSHIPS
OF
ROCHESTER
AND
MERSEA.

Middleton, J.
1918
ANDERSON
v.
TOWNSHIPS
OF
ROCHESTER
AND
MERSEA.

heavy automobile which was skidding from coming to grief would have to be a very substantial structure; and, as there are about 50 miles of drainage ditches upon highways, the financial burden would be enormous. A fence, if strong enough, would prevent cars going into the ditch; it would probably wreck many cars which now escape by reason of having greater sea-way. A ditch which is 7 feet deep looks dangerous, but a ditch 2 or 3 feet deep will wreck a car just as thoroughly, particularly when the driver has the necessary lack of experience. So, if the obligation exists, a heavy burden will be placed on municipalities.

The drainage system is not a municipal work undertaken by these townships. The works are constructed upon the highways under the authority of the Drainage Act, and if fencing is necessary the cost of fencing ought to be part of the cost of the drains and should be borne by those for whose benefit the drain is constructed. It may be that the Legislature intended to impose an obligation to fence upon the municipality which is compelled to submit to a drain passing along its highways, but it is most unlikely that it was so intended where the result would be obviously unjust. The truth is that there is no such danger in a travelled road running along a drain or along the course of a natural stream as to call for the construction of a fence. In almost every conceivable situation there is ever-present danger, but the person called upon to face the situation must face the danger and avoid disaster. There is danger of automobiles skidding on any paved street, and if the automobile strikes the kerb it is almost certain to be smashed, but so far no one has argued that therefore a kerb is a dangerous obstruction. A kerb on the road in question would not be practicable, and would have been most dangerous, and almost certainly would have overturned the car.

On the other hand, it can well be argued that where there is a dangerous situation upon a highway which might reasonably be protected by a fence or guard, then the municipality is negligent when it neglects to fence or guard.

This drainage ditch was not one which, in my view, imposed any such obligation upon the municipality. In the first place, the situation was not such as reasonably to call for this protection.

In the second place, this, to my mind, is not at all like the case of a hole in a sidewalk or the permanent pavement of a travelled

road. Nor is it a peril arising from work done by the municipality on its own road. It is the case of part of a road allowance having been taken by legislative authority for the construction of a work of a public or quasi-public character. The peril, if any, arises from the nature of that work, and the law which permits its construction does not require it to be fenced or guarded. As soon as that part of the highway was taken for the public use, the municipality was, *quoad* that work, relieved from responsibility.

The situation is not essentially different from that arising from a railway crossing a highway upon the level, or a telephone company placing poles upon the highway. The railway or the telephone company creates under legislative sanction that which would be an obstruction or a danger: this does not impose a duty upon the municipality to guard the crossing or to place lights upon the poles: see *Holden v. Township of Yarmouth* (1903), 5 O.L.R. 579.

I do not assess damages, as, if an appellate Court thinks I am wrong, it will have all the material before it, and there is no conflict as to the material facts.

While the action fails, I hope the defendants may be generous enough to forgo costs.

The plaintiff appealed from the judgment of MIDDLETON, J.

February 21. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and LATCHFORD, JJ.

Morton, for the appellant, argued that the defendants were negligent in not providing a reasonably safe road. The absence of an adequate guard-rail or fence along the course of the ditch was negligence rendering the defendants liable. There had been no contributory negligence.

Rodd, for the defendants, respondents, was not called upon.

At the conclusion of the argument for the appellant, the judgment of the Court was delivered by MEREDITH, C.J.C.P.:—Mr. Morton has not convinced any of us that the judgment appealed against is wrong. We have all, during the argument, stated our reasons for thinking that it should be affirmed. I shall now, therefore, merely restate them, or most of them, briefly.

It was not proved at the trial that the accident, out of which

Middleton, J.

1918

ANDERSON
v.
TOWNSHIPS
OF
ROCHESTER
AND
MERSEA.

App. Div.
1919

ANDERSON
v.
TOWNSHIPS
OF
ROCHESTER
AND
MERSEA.

Meredith,
C.J.C.P.

the plaintiff's claim in this action arose, was caused by neglect of the defendants' duty to repair the highway upon which it happened. The evidence, including the photographs, shews that, in performance of their duty to keep this highway, among other highways, in repair, the defendants made of it a good clay road, a very fair road, in all respects, for the locality, having regard to the means at their command for that purpose; wide enough for the traffic, and rather below than above the usual height at the crown: but, being a clay road, it was slippery in wet weather, and so, especially, a place for much caution on the part of drivers of rapid-moving self-propelled cars when in that condition. Circumstances prevent the use of gravel generally in the county of Essex; there is little to be had there; and circumstances make clay roads, to a great extent, necessary, clay soil preponderating so much. It is impossible for such a county to have roads at all comparable to those of England or France, though in the course of time that may be worked up towards; or even equal to those of other Ontario municipalities in which gravel abounds. Nor was there anything very exceptional in the ditch, at the side of the road, at the place where the car was overturned into it. Open ditches at the sides of such roads exist everywhere: they are needed to take the water from the roads and keep them dry enough for traffic: and I am unable to discover anything in the evidence, including the photographs, shewing that the work done under the drainage laws created at this particular spot any especial danger. There was a green sward, or a growth of some like character, several feet in width apparently, between the travelled part of the road and the road-side ditch, but unfortunately just at the place where the car went into the ditch there was a bare spot of several feet in length in this otherwise continuous sward, which sward ought to afford some protection even to a "skidding car on a greasy road."

Mr. Morton's main contention was that there should have been a guard-rail along the side of the road sufficient in height and strength to have stopped the "skidding" car from going into the ditch. It may be doubtful whether such a guard could be provided, practically, anywhere, without creating other possibly greater danger; but as, according to the evidence, it would need to be some 50 miles in length so to protect all such places as that

in question, it seems to me to be out of the question in this case. Growth of grass, such as I have referred to, is practical, and there is nothing in the evidence to shew that it is not preferable. It must be borne in mind that we are not dealing with a case of a deep ditch filled with water, an obvious source of unusual danger, or of an accident happening in the dark; but are dealing with the case of a dry spot only, not very different in character from those commonly existing at country road-sides everywhere; and an accident in full daylight; and so the question as to obligation to guard against danger from drains constructed under the drainage laws does not require consideration.

On this ground, want of proof that the plaintiff's injury was caused by negligence of the defendants—want of proof of such negligence—the plaintiff's action failed at the trial, as this appeal does also here.

Nor am I inclined to differ from the learned trial Judge on the question of contributory negligence, though, speaking for myself, I should preferably put my judgment upon the other ground.

On such a road, perhaps upon almost any road, in wet weather, in the midst of a heavy downpour of rain, many might say that it would be a want of a very apparent and necessary precaution to have proceeded without having chains on the tires, when the chains were in the car, and there was nothing, but anxiety to get under shelter, to have prevented them being put on.

The circumstances were such as to demand great caution to prevent "skidding;" caution as to speed, caution in turning, and caution as to all appliances available to prevent the dreaded, in such circumstances, uncontrollable slipping action of the car, commonly called a "skid:" if all such precautions had been taken, there ought not to have been an accident; and I am quite unprepared to say that the hurry to get his passengers and himself out of the heavy rain would ordinarily be considered enough, in all the circumstances of the case, to excuse a neglect of them. If he were guilty of contributory negligence he cannot recover damages even if the defendants had been guilty of negligence causing the accident, however it might be as to the other occupants of the car if they were seeking damages.

The appeal is dismissed.

App. Div.
1919

ANDERSON
v.
TOWNSHIPS
OF
ROCHESTER
AND
MERSEA.

Meredith,
C.J.C.P.

1918

[APPELLATE DIVISION.]

Dec. 18.

CITY OF TORONTO V. TORONTO R.W. CO.

Street Railway—Agreement with City Corporation—Removal of Snow and Ice from Streets—Conditions 21 and 22—55 Vict. ch. 99, sec. 25 (O.)—Construction—Action by City Corporation to Recover Damages for Failure to Remove Snow and Ice—Jurisdiction of Court—Exclusive Jurisdiction of Ontario Railway and Municipal Board—Secs. 21 and 22 of Ontario Railway and Municipal Board Act—Sec. 260 of Ontario Railway Act—Damages—Reference.

The judgment of LENNOX, J., 42 O.L.R. 603, as to the jurisdiction of the Court to entertain this action, was affirmed.

Sections 21 and 22 of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, and sec. 63 of the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31 (transferred with some modification to the Ontario Railway Act, R.S.O. 1914, ch. 185, sec. 260), considered.

The judgment was also affirmed as to the liability of the defendants for the expense incurred by the plaintiffs in removing from the streets of the city snow and ice which it was the duty of the defendants to remove.

Clauses 21 and 22 of the conditions attached to the agreement of the 1st September, 1891, validated by the Act incorporating the defendants, 55 Vict. ch. 99, sec. 1, and sec. 25 of that Act, considered.

City of Toronto v. Toronto Railway (1908), 16 O.L.R. 205, explained.

The judgment was varied by directing a reference as to damages.

AN appeal by the defendants from the judgment of LENNOX, J., 42 O.L.R. 603.

September 16 and 17. The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

D. L. McCarthy, K.C., for the appellants, argued that the Court had no jurisdiction to entertain the action, as the matters in contest were within the exclusive jurisdiction of the Ontario Railway and Municipal Board: secs. 21 and 22 of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186; sec. 260 of the Ontario Railway Act, R.S.O. 1914, ch. 185; *Town of Waterloo v. City of Berlin* (1913), 28 O.L.R. 206. The appellants were under no duty to convey away from the streets upon which their tracks are laid all the snow or ice which falls or accumulates upon the tracks, and for that purpose to seek out dumping grounds. The sweepings to the sides of the tracks were not deposits, and so the appellants were not compelled to remove them: *City of Toronto v. Toronto Railway* (1908), 16 O.L.R. 205. The plaintiffs' engineer gave no directions as to where the sweepings were to be deposited; the duty of removal, under condition 22 of the agreement between the

parties, arises only when the place of deposit is designated. The sweepings were not a nuisance: *City of Montreal v. Montreal Street R.W. Co.*, [1903] A.C. 482. The appellants were not responsible in any way for the expense incurred by the plaintiffs in removing the snow; the expense had been unnecessarily and voluntarily incurred by the plaintiffs. There was no evidence of the correctness of the plaintiffs' expense-sheets. If the appellants were liable, there should be a reference as to damages, though the appellants would accept as equitable the proportion of the expense indicated, if the amounts on the plaintiffs' sheets were correct.

C. M. Colquhoun and Irving S. Fairty, for the plaintiffs, respondents, contended that the jurisdiction of the Court was not ousted by the Ontario Railway and Municipal Board Act, or in any other way. The Board is not a Court, but an administrative body, and has no general power of adjudicating such as the Superior Courts possess: *Re Town of Sandwich and Sandwich Windsor and Amherstburg R.W. Co.* (1910), 2 O.W.N. 93; *Winnipeg Electric R. Co. v. City of Winnipeg* (1916), 30 D.L.R. 159. This action was based on breach of a statute, and also breach of a duty at common law. The appellants unlawfully deposited snow upon the streets without first having obtained the permission of the respondents' engineer. That was a breach of a statutory duty, under clauses 21 and 22 of the conditions in the agreement in schedule A of the Act of 1892, 55 Vict. ch. 99 (O.), as interpreted by sec. 25 of that Act. It was a "deposit" within the meaning of the statute. The appellants were also liable at common law. They developed a condition causing a nuisance, and it cost the respondents money to abate that nuisance. The respondents had the right, after notice, to remove the snow and charge the appellants with their share of the expense: *Toronto R.W. Co. v. City of Toronto* (1895), 24 Can. S.C.R. 589; *Corporation of Wellington v. Wilson* (1864), 14 U.C.C.P. 299; *City of Windsor v. Sandwich Windsor and Amherstburg Railway* (1916), 10 O.W.N. 205; *Township of Sarnia v. Great Western R.W. Co.* (1859), 17 U.C.R. 65; *Louth Rural District Council v. West* (1896), 12 Times L.R. 477; *Lodge Holes Colliery Co. Limited v. Wednesbury Corporation*, [1908] A.C. 323; *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. Worcester Corporation*, [1913] 1 K.B. 422. The Engineer was not required to point out the place where the snow was to be deposited. It was the duty of the appellants

App. Div.
1918

CITY OF
TORONTO
v.
TORONTO
R.W. Co.

App. Div.
1918

CITY OF
TORONTO
v.

TORONTO
R.W. Co.

Clute, J.

to find a dumping ground. As to the amount of the judgment, it was not excessive.

McCarthy, in reply.

December 18. CLUTE, J.:—Appeal from the judgment of Lennox, J., dated the 13th April, 1918, for \$16,118.44. The claim is for the cost of removal of snow from streets of the city, in January and February, 1915, which the plaintiffs contend the defendants are liable for.

Under an agreement dated the 1st September, 1891, between the plaintiffs and one G. W. Kiely and others, set out in schedule A to the statute of 1892 incorporating the defendants, 55 Vict. ch. 99 (O.), the plaintiffs claim:—

1. That the defendants unlawfully deposited snow upon those streets upon which the tracks of their railway are situated without having first obtained permission of the City Engineer, contrary to the provisions of sec. 25 of the said statute.

2. That the defendants in the said months by an electric sweeper swept the snow from their track allowances on the said streets on to the other parts of the said streets, and there unlawfully and negligently allowed the same to remain, although notified by the plaintiffs to remove the same; that the snow so swept and allowed to remain on the sides of the streets was a menace to the traffic upon the streets, and made the same dangerous and out of repair, and that the defendants neglected and refused to remove the same upon notice.

The defendants claim that they have discharged all their duties under the said agreement, and further dispute the correctness of the plaintiffs' claim. By amendment the defendants dispute the jurisdiction of this Court, and claim that the Ontario Railway and Municipal Board, by the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 22, have exclusive jurisdiction in the premises, and the plaintiffs were allowed to plead denying the exclusive jurisdiction of the Board and alleging that the legislation which purports so to enact is *ultra vires*.

The clauses referred to, in the schedule to the Act of 1892, are as follows:—

"21. The track allowances (as hereinafter specified) . . . shall be kept free from snow and ice at the expense of the pur-

chaser" (the company), "so that cars may be used continuously," etc., etc.

"22. If the fall of snow is less than six inches at any one time, the purchaser must remove the same from the tracks and spaces hereinafter defined, and shall, if the City Engineer so directs, evenly spread the snow on the adjoining portions of the roadway; but should the quantity of snow or ice, etc., at any time exceed six inches in depth, the whole space occupied as track allowances (viz., for double tracks, sixteen feet six inches, and for single tracks, eight feet three inches), shall, if the City Engineer so directs, be at once cleared of snow and ice and the said material removed and deposited at such point or points on or off the street as may be ordered by the City Engineer."

It is declared by sec. 25 of the defendants' incorporation Act, 1892, that:—

" . . . whereas doubts have arisen as to the construction and effect of sections 21 and 22 of the said conditions, it is hereby declared and enacted that the said company shall not deposit snow, ice or other material upon any street, square, highway, or other public place in the city of Toronto without having first obtained the permission of the City Engineer of the said city or the person acting as such."

I agree with the learned trial Judge that this Court has jurisdiction.

The Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 22 (from 3 & 4 Geo. V. ch. 37), provides that:—

"The Board shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other general or special Act."

The Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31, sec. 63 (transferred with some modification to the Ontario Railway Act, R.S.O. 1914, ch. 185, sec. 260), provides that where a street railway is operated upon or along a highway under an agreement with a municipal corporation, and it is alleged that such agreement has been violated, the Board shall hear all matters relating to such alleged violation, and shall make such order as may seem just, and by such order may direct the company or person operating the railway to do such things as the Board deems necessary for the proper fulfilment of such agreement, or to refrain

App. Div.
1918

CITY OF
TORONTO
v.

TORONTO
R.W. Co.

Clute, J.

App. Div.
1918

CITY OF
TORONTO
v.

TORONTO
R.W. CO.

Clute, J.

from doing such acts as in its opinion constitute a violation thereof; and (sub-sec. 2) for that purpose may enter upon the company's property and may exercise the functions of the directors.

This section was intended to get over the difficulty of forcing the railway company to obey an order of the Board; but it does not deprive this Court of jurisdiction to entertain an action for damages for breach of contract, and the question of *ultra vires* does not arise. In my opinion, therefore, this Court has jurisdiction in the present case.

Clauses 21 and 22 of the agreement, and sec. 25, explaining these clauses, above set out, were considered in the case of *City of Toronto v. Toronto Railway*, 16 O.L.R. 205, by this Court, upon an appeal by the city corporation from the judgment or order of the Railway and Municipal Board, on an application by the city to compel the railway company to desist from throwing the snow which falls upon the track allowances on to the sides of the street adjacent thereto without the permission of the City Engineer, in alleged violation of the said clauses 21 and 22. The Court "held that there was nothing in the above" (clauses and section of the Act) "to prevent the defendants from sweeping the small snowfalls or the large to the sides of the road by means of an electric sweeper, and (Meredith, J.A., dissenting) the purpose of the application being to prevent the use of the sweeper altogether, the appeal should be dismissed."

The members of the Court were not unanimous as to the meaning of the clauses as explained by sec. 25; Osler, J.A., said (pp. 207, 208):—

"Take the clauses as they stand. The track allowances are to be kept free from snow and ice, at the expense of the defendants, so that the cars may be used continuously—that is, so far as it is necessary to attain that object. If the fall of snow is less than six inches at any one time it must be *removed* from the track allowances as defined, and, if the City Engineer so directs, must be evenly spread by defendants on the adjoining portions of the roadway. But if he does not so direct, there is nothing in clause 22, whatever may be the defendants' obligation at common law not to create a nuisance by doing so, which prevents them from leaving the small falls so removed on the sides of the roadway, where accumulations of successive falls might ultimately cause a serious

interruption of the traffic. Then comes the statute, which forbids the *deposit* on the streets without the consent of the City Engineer. That means, as I understand it, a deposit for the purpose of leaving it there—a final deposit. This must refer to the first branch of clause 22, because the second branch of that clause, which deals with the case of the heavier snowfalls, expressly provides for the removal of that and for the depositing of it at such points on or off the streets as may be ordered by the City Engineer. That is the sense in which the word ‘depositing’ is used in the second branch of the clause, and the word ‘deposit’ in the declaratory section is, in my opinion, used in the same sense. When a snowfall of more than six inches occurs, the whole space occupied by the track allowances is, if the City Engineer so directs, to be *at once* cleared of snow and ice, and the material *removed* and *deposited* at such points on or off the streets as the engineer directs. The first object is to ensure the continuous running of the cars. If that can only or most conveniently be accomplished by first throwing the material off the tracks to the sides of the road, then, subject to any further obligation of the defendants, whether under the agreement or at common law, why is not that a perfectly reasonable way of complying with the agreement and the Act? . . . It becomes a question of the reasonable user of the streets within the meaning of the agreement and the Act, and I can see nothing which prevents the defendants from sweeping the small snowfalls or the large to the sides of the road by means of their sweeper, so long as they afterwards deal with it either in accordance with the directions of the engineer or otherwise, so as to prevent it from becoming a nuisance. Thus, their whole duty, whether under the agreement or the Act or at common law, is performed.”

Garrow, J.A., after reviewing the sections, reached the conclusion (pp. 210, 211) “that the statute does not . . . alter the situation. It, in fact, helps to support the view which I take—namely, that the company is bound to keep its track open, in order to give a continuous service; to do so it must at its own expense remove the snow and ice. And in dealing with it after removal and so as to prevent an undue interference with the rest of the highway, it must act under the direction of the City Engineer.”

He then held that there was no objection to the use of the electric sweeper as a convenient and expeditious mode of removing the

App. Div.
1918

CITY OF
TORONTO
v.
TORONTO
R.W. Co.

Clute, J.

App. Div.
1918

CITY OF
TORONTO
v.

TORONTO
R.W. CO.

Clute, J.,

snow from the track and depositing it temporarily upon the high-way at the side. "That is not," he said, "in my opinion, an infraction of sec. 25. 'Deposit' there must mean a deposit of a permanent character, and not one made merely in the course of removal to a permanent place."

Meredith, J.A., was of the opinion that sweeping the snow to the side of the road was depositing it within the meaning of the enactment, and that sec. 25 prohibits such deposit, and was in favour of allowing the appeal.

Moss, C.J.O., and Maclaren, J.A., concurred in dismissing the appeal.

The result of this decision was that the use of the electric sweeper was permissible. This appears to me in effect to decide that the snowfall upon the track and swept to the side was not a deposit within clause 22 of the agreement and sec. 25 of the Act. In my opinion, the effect of the clauses and the Act is to make it imperative upon the part of the railway company to remove the snow and ice, whether six inches or more. If less than six inches, it may be evenly spread upon the adjacent portions of the roadway. If more than six inches, it should be removed and deposited at such point as may be ordered by the City Engineer; and sec. 25 prohibits such deposit upon any street, square, highway, or other public place in the city, without permission of the City Engineer or the person acting as such. In my view, the effect of sec. 25 is not to do away with that portion of clause 22 which provides that, "if the City Engineer so directs," the snow and ice to be removed shall be "deposited at such point or points on or off the street as may be ordered by the City Engineer." In other words, the City Engineer may direct the railway company to deposit the snow and ice required to be removed at any particular point; and, by sec. 25, the railway company shall not deposit the same upon any street etc., without permission of the City Engineer. In the present case the defendants were ordered to remove the snow and ice, and asked direction where it should be placed. This the city authorities refused to give, taking the position that they were not bound to furnish a place whereon the snow and ice might be deposited.

After the best consideration that I can give, I am of opinion that the railway company are not relieved from their obligation

under the clauses and the sections to remove the snow and ice, even although the City Engineer refuses to name the point where the same may be deposited.

For what then are the defendants liable? They have the right to sweep the snow away under or over the six inches that is to be removed. How is this to be ascertained? It is a question of evidence.

The account was made up, according to the Works Commissioner, by a proportion of the tracks to the whole width of the road, that is, eighteen feet six inches to sixty-six feet, whereas in fact the road exclusive of sidewalk and boulevard is only forty-two feet. This would be in favour of the railway company, and he stated that it actually cost the city to remove the snow which had fallen upon the railway much more than they have charged. The amount was made up (exhibit 5) by sheets shewing the amount paid for labour and for teams for the whole roadway upon which the tracks were laid, and then charging the railway company with their proportion.

These accounts are made up of numerous items shewing the amounts paid for the different streets, Adelaide street, Avenue road, etc., but no witness was called to prove these items; they were simply produced from the books of the city, made up from the returns of the foremen. The foremen were in Court but not called. I understood Mr. McCarthy to say that he did not complain of the proportion of the expense if the amounts were correct. From the evidence one might infer that no more had been charged than a fair proportion to the railway company, but the evidence is of that uncertain character that, if the defendants desire, they should have a reference as to damages only.

The defendants should have ten days to take a reference if they so desire. If not, the appeal should be dismissed with costs. If a reference is taken, the costs of the appeal and of the reference should be in the discretion of the Master, and in other respects this appeal should be dismissed.

MULOCK, C.J. Ex., agreed with CLUTE, J.

RIDDELL, J.:—This is an appeal from the judgment of Mr. Justice Lennox in favour of the plaintiffs, the Corporation of the City of Toronto.

App. Div.
1918

CITY OF
TORONTO
v.

TORONTO
R.W. Co.

Clute, J.

App. Div.
1918

CITY OF
TORONTO
v.
TORONTO
R.W. CO.

Riddell, J.

The defendants, operating an electric railway on and along the streets of the city, failed at certain times to remove from the streets the snow which fell upon their line: after having thrown it off their line upon the other parts of the streets, the city corporation removed it, and now sue the railway company.

There were three points argued before us on this appeal: (1) the jurisdiction of the Court to entertain the action; (2) the liability of the company; and (3) the quantum.

The argument for the defendants on the question of jurisdiction is based upon the provisions of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 21, giving the Board power to investigate complaints that a railway company has failed in its duty under the statutes or agreements, and on sec. 22, which gives the Board exclusive jurisdiction in such matters.

Had the statute given the Board jurisdiction to try actions for damages based on a breach of statutory or contractual duty, there might be much in the contention: but there is nothing of the kind to be found in the statute. The Board cannot award damages; it can order a discontinuance of an improper course etc., and enforce such order; this, however, looks to the future, not the past.

To oust the jurisdiction of the Courts, an enactment must be clear—"there can be no doubt that the principle is, that the jurisdiction of the Supreme Courts can only be taken away by positive and clear enactments in an Act of Parliament:" *per* Lord Campbell in *Balfour v. Malcolm* (1842), 8 Cl. & F. 485, at p. 500; "the jurisdiction of a superior court is not to be ousted unless by express language in, or obvious inference from, some Act of Parliament:" *per* Pollock, B., in *Oram v. Brearey* (1877), 2 Ex. D. 346, at p. 348; see to the same effect *Albon v. Pyke* (1842), 4 M. & G. 421, 424.

(The Board has, in fact, never asserted jurisdiction in such a case.)

(2) To dispose satisfactorily of the second point it would be sufficient (as it seems to me) to bear in mind that the rights and duties of the parties are partly statutory and partly contractual.

The contract is, by sec. 1 of the Act (1892) 55 Vict. ch. 99, sec. 1 (Ont.), declared to be "valid and legal and to be binding upon the . . . parties:" but it is not made a part of the Act, so that it becomes itself statutory, as was the case with the agreement

considered in this Court recently in *Re City of Toronto and Toronto and York Radial R.W. Co. and County of York* (1918), 42 O.L.R. 545. While legal and binding, it is legal and binding as a contract upon the parties, it is no different from any other contract: *City of Kingston v. Kingston Electric R.W. Co.* (1898), 25 A.R. 462, at pp. 468, 469, and cases cited.

But there is the statute itself, and all our Acts are public Acts—Interpretation Act, R.S.O. 1914, ch. 1, sec. 8. Whatever those seeking the Act intended or supposed, we cannot go behind the language of the statute—nor, where the language is plain and unambiguous, can we look to the supposed purpose of the legislation: *Steele v. Midland R.W. Co.* (1866), L.R. 1 Ch. 275, 282; *North British R.W. Co. v. Tod* (1846), 12 Cl. & F. 722. Section 25 of the Act (1892) 55 Vict. ch. 99 (Ont.) says in effect that, whatever the parties may have meant in clauses 21 and 22 of their conditions, the “company shall not deposit snow, ice or other material upon any street, square, highway, or other public place in the city of Toronto without having first obtained the permission of the City Engineer”

This is a statutory prohibition in no way affected by anything the parties may have agreed to or supposed they had agreed to. Every citizen of Toronto is as much entitled to the protection of this section as the city corporation, and a wilful violation of it is undoubtedly an indictable offence under sec. 164 of the Criminal Code, R.S.C. 1906, ch. 146.

When the company appeals to clauses 21 and 22 of the conditions, the answer is plain—“Whatever these sections may on their face mean, whatever we thought that they did, must, or should mean, no such meaning, real or supposed, is to give you the right to deposit snow on the streets without the permission of the Engineer.”

Of course nothing in the way of estoppel can be claimed against the city—it cannot legally violate a statute, or give permission to violate a statute: any contract purporting to give such permission is merely void and does not create an estoppel: Halsbury’s Laws of England, vol. 13, pp. 379, 380, para. 537, and cases cited in notes (n) (o) (p), on p. 380.

As Bowen, L.J., tersely puts it in *British Mutual Banking Co. v. Charnwood Forest R.W. Co.* (1887), 18 Q.B.D. 714, at p. 718:

App. Div.
1918

CITY OF
TORONTO

v.
TORONTO
R.W. Co.

Riddell, J.

App. Div.
1918

CITY OF
TORONTO

v.

TORONTO
R.W. Co.

Riddell, J.

"If they cannot contract, how can they be estopped from denying that they have done so?"

We are concluded by the decision of the Court of Appeal in *City of Toronto v. Toronto Railway*, 16 O.L.R. 205, to hold that the mere removal by the company of the snow from their tracks upon the other parts of the street is not a "deposit" of such snow under the Act. Mr. Justice Garrow, at p. 211, says: "'Deposit' . . . must mean a deposit of a permanent character, and not one made merely in the course of removal to a permanent place." Moss, C.J.O., and MacLaren, J.A., seem to have agreed with Mr. Justice Garrow, while Meredith, J.A. (now C.J.C.P.), thought "deposit" would cover even a deposit made in the course of removal.

In the present case there was no intention on the part of the company to remove the snow from where it was placed on the street—so that the deposit was not made merely in the course of removal. I think this deposit was in violation of the statute, and the act was an actionable tort.

Even if the company can appeal to conditions 21 and 22 (and if we assume that these could qualify the statute), I do not think the defence will be advanced.

Number 21 makes provision for the track allowances being kept free from snow and ice so that the cars may run continuously, and it requires no further consideration; it gives no right to, it imposes an obligation on, the company; nor does No. 22 give the company any rights—that would dispose of the defence. But, in view of the stress laid upon this condition, it may be well to state my conception of its meaning. It has been interpreted by Mr. Justice Garrow in the case in 16 O.L.R., but his remarks are *obiter*; and we are not bound by his views. Approaching the question independently, in the interpretation of this as of any other contract, "all the surrounding circumstances must be taken into consideration—the law does not deny to the reader the same information that the writer enjoyed: he is entitled to place himself in the same situation as the party who made the contract, to view the circumstances as he viewed them, and so judge of the meaning of the words and of the correct application of the language" Addison on Contracts, 10th ed., p. 43, and cases cited.

The fact that the agreement with the conditions is made valid

by Act of the Legislature does not change the rules for its interpretation. The effect of the validation is to give every part statutory validity, but, I think, no more: *Corbett v. South Eastern and Chatham Railway Companies' Managing Committee*, [1906] 2 Ch. 12, at p. 20, and cases cited.

It should be borne in mind that the contract was to run for many years, 30 if legislation could be procured: it is therefore likely that the parties intended to provide for all cases which might be expected to arise. In our climate the winter's snow is a most important feature: and it was to be expected that all its vagaries would be kept in mind in the making of the contract.

The clearing of the track allowances being already provided for by condition 21, the ultimate disposition of the material so cleared off the track allowances is the subject of condition 22.

At the time the contract was entered into, 1891, the automobile had not made its appearance to lend a new joy—and peril—to life; in winter the usual conveyance in time of snow was the sleigh, the cutter, not the wheeled vehicle—a certain amount of snow was a desideratum, but too much was to be feared lest the spring thaw should flood the drains and fill the cellars.

The city by this condition reserved or received the right to control the disposal of the cleared matter (through the command of their engineer)—whether to better the sleighing in the streets or to prevent it being injured. In my opinion, condition 22 was intended to cover every eventuality, and the word “but” must be given its full adversative force. All difficulty may be got over by interpreting the earlier part of the condition by the latter, and reading it as though it would read when transposed, “If at any one time the fall of snow is less than six inches,” and not “If the fall of snow at any time is less than six inches.” The latter interpretation, it seems to me, has insuperable difficulties—no period is set for the “one time,” a day, a week, a month, or less or more—nor can “one time” fairly mean “one occasion” or “one storm:” it seems to me that, reading the whole section, what was in mind was not the depth of snow which might fall in any particular period, but the condition of the streets for runner traffic. Six inches was, I think, thought by the city a desirable depth for snow, beyond that, rather a danger at any (one) time. When the depth separating the runners from the pavement was less than six inches,

App. Div.
1918

CITY OF
TORONTO
v.

TORONTO
R.W. Co.

Riddell, J.

App. Div.
1918

CITY OF
TORONTO
v.

TORONTO
R.W. Co.

Riddell, J.

the city reserved the right to compel the company to place their removed material on the streets and to spread it evenly on the adjoining parts thereof, and this was not for the advantage of the company but for that of the city. When the accumulation of snow, ice, etc., was more than six inches, the city had the right, through its engineer, to compel the company to place the snow on any part of the street they chose, but not to spread it evenly at all. Surely this was to enable the city to have snow placed on those parts of the streets where there was a deficiency of "bottom"—the company bring their snow etc. and place it where directed, and the city spread it as the state of the road requires. There may be no need of snow for the streets at all: in that case the City Engineer would direct its removal elsewhere.

There is no difficulty in interpreting "the fall of snow" as meaning "the quantity of snow theretofore fallen;" we speak of the fall of snow for a year or a month, meaning the snowfall up to the end of the year or the month. The difficulty lies in the fact that in our climate snow does not always or generally lie long; the daytime sun melts and the night-cold freezes, rains come, and we have slush with all its discomforts—consequently the depth of the snow on the streets will generally not be as great as the snowfall up to that time. But I think that the parties were considering the state of the streets existing "at any one time," i.e., "at any particular time"—not the depth of the snow as it fell—and that they used the words "the fall of snow" in the same sense as "the quantity of snow or ice, etc.," in the latter part of the condition, i.e., the depth of the matter on the street, the product of the snow falling.

This interpretation, no doubt, has its difficulties, but they are not greater, but in my view less, than any other so far suggested.

In any event, however, as I have said, these conditions are not a defence for these defendants. The defendants then unlawfully placed a quantity of snow on the streets of the city, and are liable to an action in tort. The whole amount claimed in this action, however, is for the cost of removal of the snow which they threw on the street at times at which the snowfall in a snowstorm was more than six inches—the information being derived from the Meteorological Observatory. It must be admitted that, when there has been a snowfall of more than six inches on the level, it may be taken for granted that "the quantity of snow or ice, etc.," at that

time, is more than six inches, and the second part of condition 22 applies, so as to give an action also in contract. But a difficulty in the way of the city suing in contract is said to arise from the alleged fact that the duty of removal under this clause arises only when the City Engineer directs not only the removal but a "point or points on or off the street" for the deposit. There was a direction to remove; and I think the direction to deposit some place off the streets etc. of the city was a sufficient direction as to "point or points"—there being an infinity of points outside the forbidden space, any of which would satisfy the Engineer. The defendants might complain if the Engineer were too stringent and exacting, but not, I think, that he left them the whole world of land and water to choose from, saving only parts of one little city. The plaintiffs can, therefore, in my view sue in contract.

But it is unnecessary to decide that an action in contract lies: there is an action in tort, and the measure of damages is not different in the two classes of cases.

3. As to the quantum, I think the plaintiffs have claimed a much smaller sum than they could rightfully recover, and therefore the defendants have not much to complain of. But the evidence is loose and not conclusive; and, if the defendants so desire, they should be allowed a reference as to damages.

If the defendants so elect, the plaintiffs should have leave to amend, claiming a larger sum.

The defendants electing within ten days, they may have a reference as to damages only, with leave to the plaintiffs to amend; in which case the costs of the appeal and reference will be in the discretion of the Master, and the defendants will pay the costs up to appeal; if the defendants do not so elect, the appeal will be dismissed with costs.

I am unable to see that any argument can be based by either party upon the application before His Honour Judge Winchester, and the award thereon of the 5th March, 1914.

I have received from the Chairman of the Ontario Railway and Municipal Board the following communication:—

"The attitude taken by the Board is identical with the view you express. If complaint is made that an agreement between a municipal corporation and a street railway company under the

App. Div.
1918
CITY OF
TORONTO
v.
TORONTO
R.W. Co.
Riddell, J.

App. Div.
1918

CITY OF
TORONTO
v.

TORONTO
R.W. Co.

Riddell, J.

Board's jurisdiction is not being performed, and an order of the Board is sought compelling performance in specie, the Board entertains jurisdiction, and in a proper case makes an order. But, if the claim is merely in debt or damages—for a sum of money certain or capable of being ascertained in respect of a breach of contract—the Board has taken the ground that such a claim should be sued for in the Courts, and does not fall properly within its jurisdiction."

SUTHERLAND, J., agreed with RIDDELL, J.

KELLY, J.:—In the months of January and February, 1915, the respondents expended large sums of money in the removal from their streets of snow and ice, part of which, they say, the appellants were under obligation to remove, and having failed in that obligation, the respondents were compelled to remove. To recover the cost of the removal of that part, this action was brought, and judgment was given on the 13th April, 1918, in the respondents' favour for \$16,118.44 and costs. From that judgment the railway company now appeal.

The respondents base their claim chiefly upon Nos. 21 and 22 of the conditions attached to the agreement of the 1st September, 1891, between the persons named therein as purchasers and the city corporation, which agreement, with the conditions and tenders therein referred to, was validated by 55 Vict. (1892) ch. 99. By sec. 25 of that Act, conditions Nos. 21 and 22 were interpreted and construed.

Condition No. 21 is as follows:—

"The track allowances (as hereinafter specified), whether for a single or double line, shall be kept free from snow and ice at the expense of the purchaser, so that the cars may be used continuously; but the purchaser shall not sprinkle salt or other material on said track allowances for the purpose of melting snow or ice thereon without the written permission of the City Engineer, and such permission shall in no case be given on lines where horse power is used."

And condition No. 22:—

"If the fall of snow is less than six inches at any one time, the purchaser must remove the same from the tracks and spaces here-

inafter defined, and shall, if the City Engineer so directs, evenly spread the snow on the adjoining portions of the roadway; but should the quantity of snow or ice, etc., at any time exceed six inches in depth, the whole space occupied as track allowances (viz., for double tracks sixteen feet six inches, and for single tracks, eight feet three inches), shall, if the City Engineer so directs, be at once cleared of snow and ice and the said material removed and deposited at such point or points on or off the street as may be ordered by the City Engineer."

Section 25 of the Act is:—

"25. And whereas doubts have arisen as to the construction and effect of sections 21 and 22 of the said conditions, it is hereby declared and enacted that the said company shall not deposit snow, ice or other material upon any street, square, highway, or other public place in the city of Toronto without having first obtained the permission of the City Engineer of the said city or the person acting as such."

For this removal from the track allowances the appellants made use of electric sweepers, which, by means of revolving brushes, throw the snow and ice on to the part of the pavement adjoining the track allowances. The right to use these sweepers was considered by the Court of Appeal in November, 1907, on an appeal by the city corporation from an order of the Ontario Railway and Municipal Board, and by a judgment of that Court on January 22nd, 1908, *City of Toronto v. Toronto Railway*, 16 O.L.R. 205, it was held that there was nothing in the conditions above referred to, or in sec. 25 of 55 Vict. (1892) ch. 99, to prevent the company from sweeping the small snowfalls or the large to the sides of the road by means of an electric sweeper, and (Meredith, J.A., dissenting) that, the purpose of the application having been to prevent the use of sweepers altogether, the appeal should be dismissed. Written reasons were given by three of the five members composing the Court. Two, Garrow and Meredith, JJ.A., were of opinion that in all cases the company were bound to remove the snow and ice after sweeping it to the side unless the City Engineer directed that it should be spread there. Osler, J.A., stated that, when the snowfall was less than six inches at a time, the company might leave it at the side of the road unless that would create a nuisance. The other members of the Court (Moss, C.J.O., and Maclaren, J.A.) concurred in dismissing the appeal.

App. Div.
1918

CITY OF
TORONTO

v.
TORONTO
R.W. CO.

Kelly, J.

App. Div.
1918

CITY OF
TORONTO
v.

TORONTO
R.W. & CO.

Kelly, J.

I call attention to the fact that the issue there was the right to use electric sweepers. It is manifest from a perusal of the reasons for judgment that there is no declaration of even a majority of the Court that, while the company were not exceeding their rights in using these sweepers, and thus throwing the snow and ice upon the part of the roadway adjacent to the track allowances, they were at liberty to deposit the material, and so let it remain there permanently.

The company's defence in the present action sets up that they have carried out all the obligations imposed upon them with regard to the removal of the snow and ice; that the removal thereof by the city was voluntary; and that, even if the alleged expenditure was made, the money was not expended *bonâ fide* and for the purpose alleged in the claim, but was recklessly and wastefully expended for other purposes than the ostensible purpose of removing the obstruction to traffic.

An objection to the jurisdiction of the Court to entertain the action was also urged, on the ground that such jurisdiction now rests with the Ontario Railway and Municipal Board. My opinion is that the jurisdiction of the Court to hear and determine an action such as this is not ousted by the legislation from which the Board derives its powers.

The first obligation imposed upon the company by the conditions above referred to is that the track allowances shall be kept free from snow and ice at the company's expense, so that the cars may run continuously. Any doubts that might have arisen from the peculiar wording of condition No. 22 in regard to the company's obligation as a consequence of keeping the track allowances free from snow and ice in the manner directed by condition No. 21, are set at rest by the interpretation put upon these conditions (21 and 22) by sec. 25 of the Act, that the company "shall not deposit snow, ice or other material upon any street, square, highway, or other public place in the city of Toronto without having first obtained the permission of the City Engineer of the said city or the person acting as such."

The judgment of the Court of Appeal above referred to declares the right of the company to use electric sweepers in clearing the track allowances, and though in this operation snow, ice, and other material so cleared are thrown upon the adjoining portion of the pavement, the judgment does not expressly say and does not

necessarily imply that the material when so thrown may remain where thrown without further obligation upon the company.

As I read the reasons for the judgment of the Court in the light of conditions 21 and 22 and of sec. 25 of the Act, and having in mind that the only issue then involved was the right to use these sweepers, the judgment went no further than to sanction their use as one step in the process of clearing the tracks and making such disposition of the ice, snow, and other material as the company are called upon to make by these conditions, as explained and interpreted by sec. 25 of the Act. It could not have been intended to override the positive language of this legislation, nor can it successfully be argued that the judgment gave unqualified judicial sanction to an act which in itself might create a nuisance on the highway. On the evidence there can be no doubt that the snowfall which caused the accumulation, the removal of which has resulted in the present action, exceeded six inches. It is equally clear that, if not removed promptly from the portion of the pavement adjoining the track allowances where it had been thrown in the process of its removal from these track allowances, it would have been a source of great danger to those using that part of the street for purposes of ordinary and usual traffic.

But it is urged by the appellants that, even if under obligation to remove from the streets snow, ice, or other material, etc., so cleared from the track allowances, it was not their duty to do so until the City Engineer had directed and indicated the place to which such material should be removed, thus implying that it was the duty of the respondents, through their engineer, to provide a place or places for that purpose. That seems an unreasonable interpretation to put on these conditions. When taken together, and as interpreted by sec. 25, what was evidently aimed at was that the company, when under obligation to remove from the part of the street adjacent to the track allowances material (snow, ice, etc.), cleared from the tracks, should not be at liberty to deposit it on other parts of these streets or on any street, square, highway, or public place in the city, unless with the permission of the City Engineer, and that in such case it must be deposited in such places as the City Engineer would not object to. What the Engineer did in this instance was to notify the company to deposit the snow, ice, and material now in question at some point "off the streets, squares, highways, and other public places in the city;" in other words, he

App. Div.
1918

CITY OF
TORONTO
v.

TORONTO
R.W. Co.

Kelly, J.

App. Div.
1918

CITY OF
TORONTO
v.

TORONTO
R.W. Co.

Kelly, J.

stated his objection, and in plain language refused his permission to the deposit being made on any of these places—the very places prohibited by the conditions and sec. 25 referred to, unless with his permission.

The permission having been thus refused, it by no means follows that the respondents had any duty to select a place outside of these restricted or prohibited places where the deposit could be made. What the respondents were concerned in was that the place of final deposit chosen by the company should not be a place to which they (the respondents) had a right to object and did, through their Engineer, object. So far as it mattered to the respondents, all other places outside of these prohibited places were available to the company for that purpose, and if the company desired to make final deposit on any street, square, highway, or other public place in the city, of any snow, ice, or other material which they were under obligation to remove, that could be done only with the permission of the City Engineer or the person acting as such.

The Engineer's permission not having been obtained, and particularly when it was made clear to the company that it would not be granted, it was then for the company to determine where, outside of the prohibited places, the final deposit should be made. This view is not inconsistent with the conditions of the statute.

The appellants also object that the amount for which judgment has been given was not strictly proven at the trial.

An analysis of the statement setting out the claim shews clearly that the amount of it, if satisfactorily proven, is by no means excessive, but on the contrary that it is made up with liberality in favour of the appellants. Though proof was not made strictly, it seems to have been regarded by both parties as sufficient. If, however, the appellants desire proof with that strictness which they are entitled to exact, an opportunity should be afforded in a reference for that purpose, but at their risk as to costs; and, if the matter be so opened up, the respondents should be at liberty, if so advised, to amend their claim so as to meet the facts if the claim as already submitted is over-generous in amount to the appellants.

The respondents should have their costs to the time of the appeal; and, if the appellants elect to have the reference suggested above, then costs of the appeal and of the reference will be in the Master's discretion; if the appellants do not elect, the appeal will be dismissed with costs.

Appeal dismissed, subject to a reference as to damages if desired.

[APPELLATE DIVISION.]

1918

Dec. 18.

HALL MOTORS LIMITED v. F. ROGERS & Co.

Contract—Sale of Goods—Specific Articles—Second-hand Motor-trucks—Subsequent Contract for Installation of Substituted Engines—Action for Price of Engines and other Items of Account—Defence—Goods and Services Supplied in Endeavour to Implement Contract of Vendors—Failure to Prove—Counterclaim for Return of Money Paid on Account of Price of Trucks—Property Passing—Absence of Foundation for Contention that Contract Void—Leave to Litigate Counterclaim in Separate Action Improperly Granted by Trial Judge without Consent—Counterclaim for Damages for Breach of Original Contract—Undertaking by Vendors to Overhaul Trucks and Put them in "A1 Shape Mechanically"—Construction—Evidence—Failure to Prove Breach and Consequent Damage.

The plaintiffs sold and delivered to the defendants two "3½ ton second-hand Sheffield motor-trucks." The purchase-price was \$1,898. There was a written agreement of sale and purchase; one of the conditions contained in the agreement was that the plaintiffs should "properly overhaul trucks and turn them out in A1 shape mechanically." There was no concealment or misrepresentation or fraud—the defendants knew that they were getting old trucks which had been used and discarded by a mercantile company. After one of the trucks had been in use for a short time, it became manifest that the engines were not satisfactory, and an agreement was made that the plaintiffs should install other engines in the trucks, at the defendants' cost. The parties agreed that the price of the engines, including installing, should be \$500. On account of the purchase-price of the trucks the defendants paid \$300 in cash and made a promissory note in favour of the plaintiffs for \$1,598, renewable in part from time to time; before action the defendants had paid \$500 upon the note. The action was brought to recover \$490.40, the balance of an account made up of various items, some of them unconnected with the trucks; the principal item was the price of the substituted engines. Certain credits were given in the account. The defendants counterclaimed for the return of the \$800 which they had paid, and also for \$1,433.63 as damages for the loss of the use of the trucks and loss in their endeavour to operate them:—

Held, that the counterclaim for the return of the \$800 was properly dismissed by the trial Judge: the parties were dealing with certain known trucks; these were bought and sold, and the property passed; and there was no ground for the contention that the contract was void.

But the trial Judge was wrong in reserving leave further to litigate this claim in a separate action; this he should not have done without the consent of both parties.

Lockie v. Township of North Monaghan (1917), 12 O.W.N. 171, and *Tyrrell v. Tyrrell* (1918), 43 O.L.R. 272, followed.

(2) As to the plaintiffs' claim, some of the items were admitted, and as to the others the defendants did not dispute that the goods and services charged for were supplied, but contended that they were supplied in the endeavour on the part of the plaintiffs to implement their contract "to properly overhaul trucks and put them in A1 shape mechanically:"—

Held, that the onus of proving this was on the defendants; there was no evidence to establish their contention; and the plaintiffs were entitled to recover the amount of their claim.

(3) As to the counterclaim for \$1,433.63, the defendants, suing for damages for breach of the contract, must accept the onus of proving breach and consequential damages. The sale was not by description, but of two specific trucks well known to both parties and one already in the defendants' possession; the defendants did not give the plaintiffs to understand that they (the defendants) were relying upon the plaintiffs' skill or judgment;

1918
—
HALL
MOTORS
LIMITED
v.
F. ROGERS
& Co.

thus there was no implied contract by the plaintiffs except as to title; and the defendants must rely upon the express contract. To prove a breach, it was not sufficient to shew that the trucks did not run satisfactorily—it must be shewn that the overhauling given them by the plaintiffs was not sufficient to put them in “A1 shape mechanically,” that is, in first-class shape mechanically for second-hand trucks; and there was no evidence to justify the finding of a breach and damage resulting therefrom.

THE following statement of the facts is taken from the judgment of RIDDELL, J.:—

This is an appeal by the plaintiffs, with a cross-appeal by the defendants, from the judgment of the County Court of the County of York (COATSWORTH, Jun. Co. C.J.) whereby the plaintiffs’ claim was dismissed with costs, the defendants’ counterclaim for \$800 was dismissed without costs (reserving their right to bring a separate action thereon), and their first counterclaim was dismissed with costs except as to \$31.43, for which they had judgment with Division Court costs—costs to be set off *pro tanto*.

It is necessary to consider the frame of the action. It was begun by a specially endorsed writ claiming “\$490.40 for work done for the said defendants”—the particulars seem to be copied from a ledger account; they begin with

Account rendered.....	\$179.64
and then items are added running from 10 cents to \$225, amounting in all to.....	859.00

A total of \$1,038.64

Then appear three credits:

Contra account.....	\$211.07
Carburetor allowance on trucks.....	70.00
Allowance on installing.....	267.17
	548.24
Balance.....	\$490.40

An affidavit was filed by the defendants and also a statement of defence and counterclaim—these make no admissions but set out a purchase in April, 1916, by the defendants from the plaintiffs of two “motor-trucks with a loading capacity of 3½ tons” and in a perfect operating condition, non-delivery of one truck till September, a capacity of only 2 instead of 3½ tons, want of perfect operating condition, agreement by the plaintiffs to install

new engines in them, and deficiency of power in the new engines, with an allegation that the work charged for by the plaintiffs was really done on their own behalf to implement their contracts. So much for the statement of defence: the counterclaim, repeating the above statements, claimed damages for loss of the use of the said trucks and loss in the endeavour by the defendants to operate them. For this is claimed the sum of \$1,433.63, and this is the "first counterclaim" referred to by the learned County Court Judge. It is further alleged in the counterclaim that the defendants had paid the plaintiffs the sum of \$800 on account of the purchase-price of the trucks; a claim is made for the return of the \$800, and this is the counterclaim dismissed without costs at the trial.

The plaintiffs join issue simply, and on these pleadings the case goes to trial.

The history of the transaction is given by the learned County Court Judge:—

"It appears that they (the trucks) were both second-hand trucks and had been owned by the Canadian Fairbanks-Morse Company, and I believe were old trucks, out of which the best had been taken by the Canadian Fairbanks-Morse Company, because we find they sold them to Brenard & Co., junk-dealers. There is no date given for that sale or how long it occurred before the date of the contract (exhibit 1). The next transaction was the sale by Brenard & Co. to the plaintiffs of the two trucks for \$1,250. The next was the sale by the plaintiffs to the defendants of both trucks, for which the plaintiffs asked the defendants, at first, \$3,000, but finally reduced the price to \$1,898, being \$949 each for the two trucks. It is rather difficult to understand a firm of the standing and position of the defendants permitting themselves to believe that they could get good service out of two such motor-trucks, which had been evidently in use for a number of years and discarded by the Canadian Fairbanks-Morse Company and sold by them to a firm of junk-dealers. It is quite possible that occasionally there may be a good second-hand truck for sale in a bankrupt stock or something of that kind, but all circumstances here pointed to the putting of the defendants upon inquiry as to whether or not they were getting any value for their money, which appears to me very doubtful. There was apparently no

App. Div.
1918

HALL
MOTORS
LIMITED
v.
F. ROGERS
& Co.

App. Div.
1918

HALL
MOTORS
LIMITED

v.
F. ROGERS
& Co.

misrepresentation to the defendants. They brought the trucks knowing them to be old, second-hand trucks, which had been used by the Canadian Fairbanks-Morse Company, and it was quite open to them to ascertain why they had been discarded by that firm; and these circumstances, to my mind, have an important bearing upon the whole case."

The only change I would make in the above statement is to say that it is impossible to believe that the defendants imagined that they were getting anything but old and almost worn-out trucks—and, to do them justice, they do not swear that they did. Mr. Francis Rogers saw the trucks—they were in the possession of the defendants before the purchase; no misrepresentations of any kind are alleged to have been made; the contract of sale was made by and between the parties at arms' length and without fraud or concealment. Then came the agreement in writing which the defendants plead, and upon which they rely; the only important parts are as follows:—

"Hall Motors Limited agree to sell and F. Rogers & Co. agree to purchase two only 3½ ton second-hand Sheffield motor-trucks, formerly owned by Canadian Fairbanks-Morse Co., on the following conditions.

"(1) Hall Motors Ltd. to properly overhaul trucks and turn them out in A1 shape mechanically."

It is alleged that the plaintiffs did not "overhaul trucks and turn them out in A1 shape mechanically," and it is mainly for damages for breach of this contract of the plaintiffs that the counterclaim of \$1,433.63 is made.

The contract-price for the trucks was \$1,898; \$300 in cash and a note for \$1,598, renewable in part from time to time. But in this price was included \$70, the estimated cost of Raphael carburetors, which were to be put in the trucks; it was agreed that this would be waived, and accordingly the defendants would be credited with \$70. This is the second item of credit in the plaintiffs' statement.

After one of the trucks had been in use for a short time, it became manifest that the engines were not satisfactory, and an agreement was made that the plaintiffs should "install" other engines in the trucks, at the defendants' cost. The precise terms are differently stated by the parties. The plaintiffs contend that

the defendants agreed to pay \$225 for each substituted engine and also the cost of installing, and many of the items in the plaintiffs' statement are for the cost so computed.

The defendants assert that they were to pay \$250 each for the engines, including installing. Whatever the truth, the parties agreed long before action that the price should be \$250 each, including installing. Of course, the claim of the plaintiffs should have been put on that agreement; but, apparently for book-keeping reasons, the account of the defendants was left in its original shape, and \$267.17 was entered on the credit side, "allowance on installing." This is the third item of credit in the plaintiffs' claim. The first item of credit is an account of the defendants against the plaintiffs—quite unconnected with the motor-truck transaction. It is admitted, as is the first item, "Account rendered, \$179.64," in the plaintiffs' claim.

November 15. The appeal and cross-appeal were heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

L. F. Heyd, K.C., for the plaintiffs, argued that two new engines each worth \$250 had been installed under a separate contract, and these should be paid for at any rate, as they could not be said to be part of the work which the defendants said should have been done by the plaintiffs. As to the counterclaims, there was no virtue in either of them. In regard to the first, namely, the claim of \$1,433.63 for damages for breach of contract in not properly overhauling the trucks—this could not succeed because the agreement by the plaintiffs to overhaul the trucks and turn them out in A1 shape mechanically, meant in that condition for second-hand trucks. This the plaintiffs had done. As to the second counterclaim, namely, the return of the \$800 paid on account of the purchase-price—this must fail because the property had passed to the defendants. There had been no fraud or misrepresentation, and the defendants knew that the trucks were second-hand and very old when they bought them.

George Wilkie, for the defendants, contended that the plaintiffs had broken their contract to overhaul the trucks and turn them out in A1 shape mechanically. This did not mean A1 shape for second-hand trucks, but meant just what it said. On account of this breach of contract, the defendants should get

App. Div.
1918

HALL
MOTORS
LIMITED

v.
F. ROGERS
& Co.

App. Div.
1918

HALL
MOTORS
LIMITED

v.

F. ROGERS
& Co.

Riddell, J.

back the \$800 paid on account, and also the sum of \$1,433.63 for the loss of the use of the trucks and loss in trying to operate them.

Heyd, in reply.

December 18. The judgment of the Court was read by RIDDELL, J. (after setting out the facts as above):—It must be obvious that there were only three questions to be tried: (1) the damages, if any, to which the defendants were entitled for breach of the primary contract; (2) the right of the defendants to recover the \$800 paid by them on their contract-price; and (3) the items of the plaintiffs' claim (outside of the \$179.64) and beyond the \$500 admittedly due.

The learned County Court Judge found the first of the above questions in favour of the plaintiffs, and from that finding the defendants appeal.

The second question the learned Judge dealt with in a peculiar way; he has dismissed this part of the counterclaim without costs, but allowed a separate action to be brought. This he should not have done without consent: *Lockie v. Township of North Monaghan* (1917), 12 O.W.N. 171; *Tyrrell v. Tyrrell* (1918), 43 O.L.R. 272. We endeavoured to have the parties agree that the whole matter should be opened and tried in an action now pending. Such consent was not given. No imputation of misconduct or impropriety is made in respect of either counsel; each, standing on his strict rights, acted as he conceived it to be best in the interest of his clients, which was his plain duty; and we must deal with the case as we find it on the facts and law.

Upon the admitted facts of the case this branch of the counterclaim could not possibly succeed; it is based upon the hypothesis that the sale of the trucks was null and void, to mention which is sufficient to shew its absurdity. The parties were dealing with certain known trucks; these certain trucks were bought and sold, the property passed; and there is no more reason for the contention that the contract was void than for the contention that when a certain known horse is bought the contract of sale is void if he does not come up to a warranty. The learned County Court Judge rightly dismissed this claim, but he should not have reserved leave further to litigate it: *Lockie v. Township of North Monaghan*, *supra*.

I cannot understand the course taken in respect of the plaintiffs' claim. The learned County Court Judge has dealt with it as though the plaintiffs succeeded only on their account rendered, \$179.64 (which is admitted), and that the defendants had pleaded their admitted account of \$211.07 as a set-off, under the Ontario Judicature Act, sec. 126, and has given judgment as directed by sec. 128 for the excess of \$211.07 over \$179.64, i.e., \$31.43. But the account of \$211.07 is not pleaded by the defendants as a set-off (a defect which we would readily correct by an amendment of the pleadings); and, what is much more important, the learned trial Judge has entirely ignored the plaintiffs' admitted claim for \$500 for the new engines, and also the \$70 admittedly allowed to the defendants on the carburetors. (Of course, the plaintiffs could not, without the consent of the defendants, unless there was an agreement to set off, bring the \$70 or the contra-account of \$211.07 into the action: *Re Furnival v. Saunders* (1866), 26 U.C.R. 119; *In re Jenkins v. Miller* (1883), 10 P.R. 95; *Osterhout v. Fox* (1907), 14 O.L.R. 599; but there is nothing to prevent the defendants allowing this to be done, and here they do not object.)

With the findings of the trial Judge, the judgment should have been for the plaintiffs, dismissing the defendants' counterclaim and allowing the plaintiffs' claim at \$398.57 made up as follows:—

Account rendered admitted.....	\$179.64
New engines, including installing.....	500.00
	<hr/>
	\$679.64

Less

Contra-account admitted.....	\$211.07
Allowance for carburetors	70.00
	<hr/>
	281.07

Balance	\$398.57
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This result, however, leaves quite out of account the items contained in the plaintiffs' statement other than the admitted account, \$179.64; and these items are now to be considered. These items are admittedly made up of: (1) \$225 for each of the two new engines; (2) the installing of the same; and (3) certain other items unconnected with the engines and their installation. The first two classes of items must be disallowed, as admittedly

App. Div.
1918

HALL
MOTORS
LIMITED
v.
F. ROGERS
& Co.

Riddell, J.

App. Div.
1918

HALL
MOTORS
LIMITED
v.
F. ROGERS
& Co.

Riddell, J.

they were replaced by the fixed sum of \$500; but at the same time the third credit item on the plaintiffs' statement, "allowance on installing \$267.17," also disappears. There is no dispute that all the items were actually supplied, but the defence is that they were (at least mostly) so supplied in the endeavour on the part of the plaintiffs to implement their contract "to properly overhaul trucks and turn them out in A1 shape mechanically." The onus of proving this is on the defendants, and they admit that some of the items are properly chargeable. I can find no evidence to establish the contention of the defendants. The plaintiffs' counsel has pointed out some 25 items, amounting in all to \$111.40, wholly unconnected with the new engines and their installation; we have no evidence the other way; and that sum should be added to the plaintiffs' judgment, making in all $\$398.57 + 111.40 = \509.97 . But the plaintiffs do not claim more than \$490.40—*quilibet renuntiare potest juri pro se introducto et invito beneficium non datum*—and they should have judgment for that sum with interest from the date of the writ, with costs here and below. They should, however, not be limited to that sum if it be found that the defendants are entitled to their counterclaim for breach of contract.

The learned trial Judge dismissed the counterclaim from the following considerations:—

"When the defendants found that the trucks were not working and were not in A1 shape mechanically, according to the contract which the plaintiffs made with the defendants, then what was the defendants' duty? Was it not to return the cars to the plaintiffs and tell them that they had not been properly overhauled and turned out in A1 shape mechanically, and therefore the defendants could not accept or use them? This, to my mind, the defendants ought to have done. Instead of that, they spent a great deal of time and took a great deal of trouble trying to fix these old cars up and nurse them along and make them satisfactory, all of which was probably very praiseworthy between two friends; but, when they come into Court for a legal decision, I am bound to find that the defendants had no right to do as they did with the cars and spend so much time upon them, and pay the bill for repairs and be out of service of them in the manner set out; and that, failing to return the cars at once to the plaintiffs, which

they might have done in pursuance of the contract, they are not entitled to recover the amount of their first counterclaim against the plaintiffs."

It is impossible to support the conclusion arrived at by the reasons given—if the defendants intended to repudiate their purchase and claim that the contract was void, they might well tender back the trucks and demand their money back; but that they did not intend to do, they intended to remain owners of the trucks and to rely upon the contract. Upon the facts of this case they could not do otherwise.

By acting as they did, they did not deprive themselves of the right to sue for damages for breach of the express contract; and, if they have established a breach and consequential damages, they are entitled to judgment on this counterclaim. Even if the case had been, as suggested but hardly argued, that the trucks did not answer the description, the proper course was to sue on the agreement after they had been used by the defendants as their own: *Behn v. Burness* (1863), 3 B. & S. 751 (Cam. Scacc.); *New Hamburg Manufacturing Co. v. Webb* (1911), 23 O.L.R. 44; *Hill v. Rice Lewis & Son Limited* (1913), 28 O.L.R. 366, 12 D.L.R. 588, and cases cited.

Nor, as was also suggested, could it be that the learned trial Judge looked upon the trucks as not of value, and, by setting off the items of the plaintiffs' claim which he omitted to dispose of against the expense to which the defendants had been put, he thought he was doing substantial justice. There is no semblance of such an idea in the reasons for judgment: and of course the trial Judge knew that he sat not to give to the parties substantial justice in the abstract but substantial justice according to law: *Gardner v. Merker* (1918), 43 O.L.R. 411, 44 D.L.R. 217. In a court of justice every litigant is entitled to every right the law gives him—the Judge may and very often does act as conciliator, he may by consent of both parties act as arbitrator; but, when he acts as Judge, he is bound to administer law; and, if any litigant is not given every right to which he is entitled by law, a wrong is done him. *Misera est servitus ubi jus est vagum aut incertum*. The learned Judge did not affect to arbitrate, but he was giving his view of the legal rights of the parties.

The defendants then, suing for damages, must accept the onus of proving breach and consequential damages.

App. Div.
1918

HALL
MOTORS
LIMITED

v.
F. ROGERS
& Co.

Riddell, J.

App. Div.
1918

HALL
MOTORS
LIMITED
v.
F. ROGERS
& Co.

Riddell, J.

To understand the full extent of the alleged contracts, the facts of the case must be borne in mind.

This sale was not by description, but of two specific trucks well known to both parties and one already in the defendants' possession; there is no pretence in the evidence that the defendants gave the plaintiffs to understand that they were relying upon the plaintiffs' skill or judgment. There was no implied contract then by the plaintiffs except as to title: Halsbury's Laws of England, vol. 25, paras. 282, 284; and the defendants must rely upon the express contract itself. It is said that the trucks were not $3\frac{1}{2}$ ton trucks, but at the best would carry only 2 tons. But the sale was of the two well-known trucks, which were known in the trade as $3\frac{1}{2}$ ton trucks, a name rather than a description of the load they could carry; and in any case it is plain that the trucks could carry $3\frac{1}{2}$ tons of coal; the trouble was in the motor apparatus. As will be seen, any defect in the Russell engines was not covered by the original contract—they were the subject of a different contract altogether, not sued on in this action: Halsbury, vol. 25, p. 159.

Then as to the express contract of the plaintiffs, it must be borne in mind that the trucks were second-hand, "almost pre-historical," so worn-out that their former owners had sold them for junk; the contract to "turn them out in A1 shape mechanically" does not require the plaintiffs to turn them out as good as new, but in A1 shape, i.e., first-class shape mechanically for second-hand trucks.

It is not sufficient to shew that the trucks did not run satisfactorily—naturally with their history they would not run satisfactorily—it must be shewn that the overhauling given them by the plaintiffs was not such as to put them in A1 shape mechanically for second-hand trucks. I can find no evidence of that kind: the "expert" finds the main if not the only fault in the engines—"it was out of a touring car" (p. 206), "a Russell motor-engine" (p. 204); but the Russell motors were put in on a special contract for these very motors. Then he says that "it was out of alignment," but there is no evidence how this came about, and in any case that had nothing to do with the original contract. The defendants are not suing for damages for breach of implied contract to put the Russell engines in properly, and we are not to pass

upon that contract in this action—the defendants, no doubt, may, if they are so advised, set it up specifically in another action. Something is said about the clutch by this expert, but it seems that the particular clutch he described was not put in by these plaintiffs: and in any case it had nothing to do with the original contract.

I have read all the evidence, most of it more than once, and I can find nowhere anything to justify a finding of breach of this contract by the plaintiffs and damage resulting therefrom—nor could the able and diligent counsel for the defendants refer us to any such evidence.

I would allow the appeal of the plaintiffs and direct judgment to be entered in their favour for \$490.40 and interest from the teste of the writ, with costs here and below, and dismiss the cross-appeal of the defendants, thereby dismissing both branches of the counterclaim with costs here and below.

As I have already said, this will not prevent the defendants, if so advised, setting up in any other action breach by the plaintiffs of an implied contract to install the Russell engines skilfully—although it will operate by way of *res adjudicata* to prevent them setting up the claim for \$800 and that for damages based upon the original contract.

Plaintiffs' appeal allowed.; defendants' appeal dismissed.

App. Div.
1918

HALL
MOTORS
LIMITED

v.
F. ROGERS
& Co.

Riddell, J.

1918

[APPELLATE DIVISION.]

Nov. 25.

Dec. 5.

Dec. 18.

RE WATERLOO LOCAL BOARD OF HEALTH.
CAMPBELL'S CASE.

Nuisance—Abatement—Public Health Act, secs. 6, 81—Report of Provincial Board of Health—Determination of Question of Nuisance or no Nuisance—Application to Judge of Supreme Court of Ontario—Jurisdiction of Judge—Order Directing Abatement of Nuisance—Affidavits Supporting Report of Board—Inadmissibility—Affidavits in Answer—Weight of—Refusal of Judge to Grant Enlargement—Absence of Prejudice—Leave to Appeal—Judges' Orders Enforcement Act, sec. 4—Deposit of Garbage of City by Contractor on Land in Township—Complaint of Local Board of Health of Township—Contractor Agent or Servant of City Corporation, not Independent Contractor—Liability of Corporation, Contractor, and Landowner—Time for Abatement—Extension of.

An order was made, on the application of the Local Board of Health of the Township of W., by a Judge of the Supreme Court of Ontario, under sec. 81 of the Public Health Act, R.S.O. 1914, ch. 218, directing the removal and abatement of a nuisance found by a report of the Provincial Board of Health to be existing on the land of C., in the township of W., due to the deposit and presence thereon of garbage from the city of K., collected and carried to the land by a garbage disposal company.

Leave to appeal to a Divisional Court from the order was given by a Judge of the Supreme Court of Ontario to the city corporation, the garbage disposal company, and C., under sec. 4 of the Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79 (made applicable by sub-sec. 3 of sec. 81 aforesaid); and upon appeal it was *held* by a Divisional Court:—

- (1) That the Public Health Act confers jurisdiction upon the Provincial Board of Health to determine the question whether a nuisance does or does not exist (see sec. 6), and there is no jurisdiction in the Judge to try that question of fact. The Judge may, before ordering abatement, admit "further evidence" (sub-sec. 2 of sec. 81), not for the purpose of setting aside the finding of the Board, but that he may determine whether, in all the circumstances, an order for abatement should issue and if so upon what terms.
- (2) That the appellants were not prejudiced by the refusal of the Judge to enlarge the application for the order, when made before him, for the purpose of allowing the appellants (the respondents upon the application) to file affidavits in answer to the application; the affidavits then proposed to be filed were produced upon the appeal, and the Judge would not have been justified in attaching any weight to them had they been before him. Affidavits supporting the finding of the Board were inadmissible.
- (3) That, while the contract between the city corporation and the garbage disposal company did not provide for the disposal of the garbage, but simply for its collection and cartage to a point outside of the city limits, the garbage, while in the company's hands, remained the property of the city corporation and under its control; and, in the absence of express instruction, the company had implied authority as agent or servant of the corporation to dispose of it, and disposal was made of it by the garbage company not as an independent contractor but as agent or servant of the corporation, whereby the corporation became liable, as well as the company and C., for its wrongful disposal.

Dalton v. Angus (1881), 6 App. Cas. 740, and *Robinson v. Beaconsfield Rural District Council*, [1911] 2 Ch. 188, followed.

The order of the Judge was varied by extending the period of time within which the nuisance should be abated.

AN application by the Local Board of Health of the Township of Waterloo for an order that the Corporation of the City of Kitchener, the Riverside Garbage Disposal Company Limited, and A. B. Campbell do forthwith remove and abate a nuisance caused and maintained by them upon that portion of lot 58 of the German Company Tract of the Township of Waterloo owned by the said A. B. Campbell, by the deposit of garbage thereupon.

The application was made under sec. 81 of the Public Health Act, R.S.O. 1914, ch. 218.*

November 25. The application was heard by HODGINS, J.A. *J. C. Haight*, for the applicants.

Grayson Smith, for the city corporation.

R. McKay, K.C., for the company and Campbell.

November 25. HODGINS, J.A.:—The respondents to this application applied at the opening of the case for an enlargement in order to answer the affidavits filed on behalf of the applicants. They produce nothing except letters from their principals, the excuse being the absence of the solicitor. The examinations of the Mayor and Clerk of the City of Kitchener were taken on the 19th November and that of Campbell on the same day. They were taken in the court-house in Kitchener and in the presence of the solicitor, Mr. Sims, who appeared for the City of Kitchener, so that the absence of affidavits in answer is not important.

In a matter affecting public health in which the conditions appear to be as dangerous as they do in this case, I think I should

*81.—(1) If, on investigation by the Local Board, any nuisance is found to exist, and if after the Board has required the removal or abatement of the same within a specified time, the Board finds that default in removal or abatement has been made, and the case appears to the Local Board to involve the expenditure or loss of a considerable sum of money, or serious interference with any trade or industry, or other considerations of difficulty, the Provincial Board at the request of the Local Board may investigate and report upon the case.

(2) If the report of the Provincial Board recommends the removal or abatement of the nuisance, the Local Board or any ratepayer residing in the municipality, or within a mile thereof, may apply to a Judge of the Supreme Court for an order for the removal or abatement of the nuisance, and to restrain the proprietors of any such industry from carrying on the same until the nuisance has been abated to the satisfaction of the Provincial Board; and the Judge may make such order upon the report of the Provincial Board or upon such further evidence as he may deem meet.

(3) The Judges' Orders Enforcement Act shall apply to every order made by a Judge under this section.

1918

RE
WATERLOO
LOCAL
BOARD
OF
HEALTH.
CAMPBELL'S
CASE.

Hodgins, J.A.
1918
RE
WATERLOO
LOCAL
BOARD
OF
HEALTH.
CAMPBELL'S
CASE.

not grant an enlargement unless some very serious question arose as to whether the nuisance did exist or some question as to its abatement since the motion was made. The question upon this motion is not really whether a nuisance does or does not exist in fact, and that forms part of my reason for refusing an enlargement and considering it necessary to deal with the motion to-day.

Under the Public Health Act, R.S.O. 1914, ch. 218, sec. 73, a nuisance is defined as any condition existing which is or may become dangerous to health or prevent or hinder in any manner the suppression of disease. By sec. 74 (e), the particular nuisance in this case is defined and stated to be a nuisance. I think that under the section upon which application is made, 81, the Court is practically relieved from saying whether or not this is a nuisance in fact, by reason of the report of the Provincial Board of Health. As I read the section, the Local Board of Health, on discovering a nuisance, is enabled to cause an inspection to be made and can deal with the nuisance, and if, under sec. 81, in certain cases, of which this appears to be one, the Local Board desires it, the Provincial Board may also investigate, and it then becomes the province of a Judge of the Supreme Court to make an order on the basis of the report. If the report of the Provincial Board recommends the abatement of the nuisance, the Judge is entitled to deal with the matter by making an order for abatement if the conditions of the statute are fulfilled. I do not think that the Judge is necessarily bound by the report of the Provincial Board; but if, on reading that report, he comes to the conclusion either that the nuisance is not distinctly brought within the statute or that some further explanation is desirable, he has the right to ask for further evidence. But in this case I do not feel that it is necessary to take that course, partly because the report is clear, and partly because counsel before me who represent the respondents express their willingness on behalf of their clients to undertake that nothing further shall be done in the direction of what has occurred; and this, to my mind, involves practically the conclusion that what has been done heretofore is something that ought not to have been done, and that it was a nuisance.

That being the case, the only point left, it seems to me, is whether Mr. Smith is right in saying that the city corporation is not affected and should not have been a party to this application.

I think that is covered by the case cited of *Robinson v. Beaconsfield Rural District Council*, [1911] 2 Ch. 188. The contract here with the Riverside Garbage Company does not provide for the disposal of the sewage but merely for its removal out of the city. Therefore, the city corporation having decided to remove it, through a contractor, outside of the limits of the city, is itself responsible in law for its disposal, and is bound, if the disposal constitutes a nuisance, to abate it.

As to the respondent Campbell, his premises are being used for the disposal of this garbage, which is left open on the ground, and this makes the whole situation, in the words of the Provincial Board's report, "most insanitary and a serious nuisance and dangerous to the public."

The contracting company which brought the garbage out and deposited it is, in like manner, responsible for the nuisance. On the whole case, I think that I should make the order now that is asked, for the abatement of the nuisance. This, as I understand the present condition, will be an order for the removal or destruction of the garbage and so forth deposited upon this farm and at present lying exposed thereon, and will be against the three respondents

I do not think that on the present motion I can grant an injunction except as to Campbell; all that I can do is to deal with the report as it is before me and order the abatement of the particular nuisance complained of.

It seems to me that this is a pressing matter; that, at this time of the year, the depositing having continued down to the 12th November, Mr. Haight is right and that it may be frozen in, or, if the weather continues mild, it may partly drain away into the creek and thence into the Grand River. The order should therefore be an order for immediate abatement.

Campbell will be restrained from receiving the garbage for the purpose of allowing hogs to be fed upon it or from feeding hogs from it.

Costs will go against all the respondents.

Since I delivered judgment, Mr. Smith has referred me to the Municipal Act, R.S.O. 1914, ch. 192, sec. 406(5). I am unable to see how the power to provide by by-law for the disposal of garbage affects this case, in which the power was not exercised.

Hodgins, J.A.

1918

RE

WATERLOO
LOCAL
BOARD
OF
HEALTH.

CAMPBELL'S
CASE.

Hodgins, J.A.

1918

RE

WATERLOO

LOCAL

BOARD

OF

HEALTH.

CAMPBELL'S

CASE.

The order of HODGINS, J.A., as settled and issued, was as follows:—

(1) That the said the Corporation of the City of Kitchener, the Riverside Garbage Disposal Company Limited, and A. B. Campbell do forthwith wholly remove and abate the nuisance existing on the said lands due to the deposit and presence thereon of garbage from the City of Kitchener and do forthwith remove from the said lands, or wholly destroy, all such garbage so deposited on the said lands and now lying thereon.

(2) That the said A. B. Campbell be and he is perpetually restrained from receiving upon the said lands garbage for the purpose of allowing hogs to be fed thereupon and from feeding hogs on the said lands upon garbage so received.

(3) That the said the Corporation of the City of Kitchener, the Riverside Garbage Disposal Company Limited, and A. B. Campbell do pay to the applicants their costs of and incidental to this application and order forthwith after taxation thereof.

The city corporation, Campbell, and the company moved, under sec. 4 of the Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79,* for an order for leave to appeal from the order of HODGINS, J.A.

The motion for leave was heard by FERGUSON, J.A.

McKay, K.C., for the company and Campbell.

Grayson Smith, for the city corporation.

Haight, for the Local Board of Health.

December 5. FERGUSON, J.A.:—The applicants contend that they were not permitted to present properly to the Court their answers or contentions, in that the learned Judge refused an adjournment asked for by counsel, for the purpose of filing material and receiving further instructions. They also contend that the part of the order which directs how the nuisance complained of shall be abated, and the part which restrains the defendant

*Section 4 provides: "There shall be no appeal from such order"—that is, an order made by a Judge as *persona designata*—"unless an appeal is expressly authorised by the statute giving the jurisdiction or unless special leave is granted by the Judge making the order or by a Judge of the Supreme Court, in which case the appeal shall be to a Divisional Court whose decision shall be final."

Campbell from receiving on his property garbage for the purpose of feeding hogs, and from feeding hogs upon garbage, are in excess of the powers of a Judge acting under the Public Health Act, and an improper interference with a contract between the City of Kitchener and Campbell.

I am of opinion that the questions raised are such as to justify my granting leave to appeal: this I do, but on the terms that the applicants undertake to serve notices of appeal forthwith, and to set the appeals down, so that they shall be ready for hearing on Wednesday next, and also forthwith to apply to the Chief Justice of the Exchequer for a direction that the appeals be put upon the peremptory list for some day next week.

Costs of this application and order to be costs in the appeals.

The appeals were entered for hearing accordingly.

December 13. The appeals were heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

Gideon Grant, for the Riverside Garbage Disposal Company Limited and A. B. Campbell, appellants, argued that on the original motion before HODGINS, J.A., an enlargement should have been granted in order to enable the appellants to prove the non-existence of a nuisance, and that there should have been an issue directed to determine the existence of a nuisance. He also urged that the injunction was too wide, and should have merely restrained the appellants to the extent of not causing a nuisance.

R. S. Robertson and *H. J. Sims*, for the Corporation of the City of Kitchener, appellant, contended that the city corporation was not liable, as the Riverside Garbage Disposal Company Limited was an independent contractor. The city corporation was under no obligation to remove the garbage, and had no control over it: *Re Jones and City of Ottawa* (1907), 9 O.W.R. 323.

Haight, for the Local Board of Health of the Township of Waterloo, respondents, argued that the question of nuisance was not open, as it had been determined by the Provincial Board of Health under the Provisions of the Public Health Act: *Attorney-General v. Hughes* (1899), 81 L.T.R. 679. The learned Judge below was right in refusing an enlargement, because the only evidence sought to be adduced was for the purpose of shewing that there

Ferguson, J.A.
1918
RE
WATERLOO
LOCAL
BOARD
OF
HEALTH.
CAMPBELL'S
CASE.

App. Div.
1918

RE
WATERLOO
LOCAL
BOARD
OF
HEALTH.

CAMPBELL'S
CASE.

Mulock, C.J. Ex.

was not a nuisance. But that question had already been determined. As to the liability of the city corporation, the company was the agent of the corporation in the disposal of the garbage, and the corporation was responsible for the nuisance created by its agent: *Robinson v. Beaconsfield Rural District Council*, [1911] 2 Ch. 188.

December 18. The judgment of the Court was read by MULOCK, C.J. Ex.:—These are appeals by the Riverside Garbage Disposal Company Limited, A. B. Campbell, and the Corporation of the City of Kitchener, from the order of Hodgins, J.A., directing the appellants forthwith wholly to remove and abate a certain nuisance, and perpetually restraining the said Campbell from receiving upon the lands in question garbage for the purpose of allowing hogs to be fed thereon, and from feeding hogs on the said lands on the said garbage.

The circumstances which give rise to the question in issue between the parties are as follows:—

By a certain agreement, bearing date the 15th April, 1918, made between the Corporation of Kitchener, therein called "the city," and the Riverside Garbage Disposal Company, therein called "the contractor," the latter agreed for three years to collect garbage throughout the whole city, the city agreeing to pay to the contractor for such services the yearly sum of \$10,000, the contractor agreeing to "remove all garbage from the limits of the city" and to "indemnify and hold the city harmless from all loss, costs, charges, damages, and expenses which the city may at any time hereafter bear, sustain, suffer, be at, or put to, by reason or on account of the improper or negligent collection or disposal of said garbage."

The contractor on or about the 15th April, 1918, and continuously thereafter, collected the city garbage, and, with the consent of Campbell, deposited it upon certain lands in his possession, situate in the township of Waterloo, being a short distance outside of the city limits; and there hogs, owned by Campbell, were allowed to feed on the raw garbage. The depositing of this garbage gave rise to an agitation for its prevention on the ground of its being a nuisance, and the matter came before the Local Board of Health of the Township of Waterloo, which, having investigated conditions, made the following report:—

"To the Riverside Garbage Disposal Company Limited, A. B. Campbell, and the Corporation of the City of Kitchener:

"The Local Board of Health of the Township of Waterloo has fully investigated the conditions arising and existing from the deposit of garbage from the city of Kitchener, collected in the city by the Riverside Garbage Disposal Company Limited, under a contract with the city, and deposited by the company on lands owned by A. B. Campbell, in the township of Waterloo, a short distance easterly from the corporation limits of the city, and has found that a grave nuisance exists, and has existed there continuously since April last, in consequence of such disposal and deposit of garbage. The Board consequently requires the removal or abatement by you of such nuisance within 15 days from the service of this notice upon you.

"Dated this 5th day of October, 1918.

"The Local Board of Health of the Township of Waterloo.

"A. Jansen,

"Chairman.

"Peter A. Snider,

"Secretary."

The nuisance remaining unabated, the Local Board requested action by the Provincial Board of Health, and the latter, having investigated conditions, made the following report:—

"Report of the Provincial Board of Health in respect to a nuisance in the Township of Waterloo.

"In pursuance of the request of the Local Board of Health in the Township of Waterloo, dated the 26th October, 1918, and acting under the authority of section 81 of the Public Health Act, the Provincial Board of Health has investigated and now reports upon a nuisance existing on the border-line between the City of Kitchener and the said Township of Waterloo, and within the limits of the said township.

"The nuisance complained of exists in a woods said to belong to Mr. A. B. Campbell, who has a 3 years' contract for the removal and disposal of the garbage of the City of Kitchener, beginning in April last. Since that date it appears that the contractor has been depositing the city garbage along a roadway and for several yards on each side thereof, through the woods referred to, for a distance of a couple of hundred yards, commencing at the entrance to the

App. Div.
1918

RE
WATERLOO
LOCAL
BOARD
OF
HEALTH.

CAMPBELL'S
CASE.

Mulock, C.J.E.

App. Div.
1918
—
RE
WATERLOO
LOCAL
BOARD
OF
HEALTH.
CAMPBELL'S
CASE.
—
Mulock, C.J.Ex.

woods from one of the main travelled roads leading to the city. The deposit of garbage consists of ashes, cast-off clothing, filthy paper, wire, tin, sheet iron and enamelled ware, decomposing animal and vegetable material, meat-bones, vegetables and fruit, kitchen waste, etc. The garbage referred to is practically uncovered and exposed and is being rooted over by hogs.

"Much of the garbage lies upon the bank of and drains to a creek, which a few hundred yards further on empties into the Grand River, the latter being a source of water supply to communities down that river. The whole situation is a most insanitary one, a serious nuisance, and extremely dangerous to the public. The Provincial Board of Health therefore recommends the abatement of this nuisance at the earliest date possible.

"Signed and sealed on behalf of the Board this 12th day of November, 1918.

"A. H. Wright,
Chairman.

(Seal)

"John W. McCullough,
Chief Officer."

On the 15th November, 1918, the Local Board of Health of the Township of Waterloo served a notice of motion on the city, the contractor, and Campbell, that it would, on the 25th November, 1918, move before the presiding Judge at Osgoode Hall for an order directing them forthwith to remove and abate the nuisance in question, and restraining them from further depositing garbage on the said lands until said nuisance should be abated. This motion came on to be heard before Hodgins, J.A., when counsel for the appellants asked for an enlargement in order to enable them to adduce evidence of the non-existence of the nuisance and to cross-examine Dr. Thompson, Dr. McNally, Alfred Henhoeffler, Abram Baker, and James C. Haight, on affidavits to be used in support of the motion. The learned Judge refused an enlargement and made the order complained of, and this appeal is from that order.

The appellants attack the order chiefly on two grounds: (1) that an enlargement should have been granted in order to enable them to prove the non-existence of the nuisance complained of; and (2) that an issue should have been directed to determine the existence of the nuisance charged.

The method of determining whether a nuisance exists is set

forth in the Public Health Act, ch. 218, R.S.O., sec. 6 of which enacts as follows: "It shall be the duty of the Provincial Board, and it shall have power to,— . . . (d) Determine whether . . . the disposal of sewage, trade or other waste, garbage or excrementitious matter is a nuisance or injurious to health." The Provincial Board investigated the conditions and made the report above set forth.

Sub-section 2 of sec. 81 of the Act provides that if the Provincial Board recommends the removal or abatement of the nuisance the Local Board or a ratepayer may apply to a Judge of the Supreme Court for an order for the removal or abatement of the nuisance, and "the Judge may make such order upon the report of the Provincial Board or upon such further evidence as he may deem meet."

The evidence shews that the Local Board of Health investigated the conditions and found that "a grave nuisance exists." Then the Provincial Board of Health conducted an investigation and found to the same effect. The undisputed evidence shews that the garbage of a city, having a population of about 20,000, has been deposited since the 15th April last on the surface of the land in question, that it is not covered with earth or in any way treated to prevent decomposition or the giving off of offensive odours, and that hogs of the appellant Campbell are allowed to feed upon this garbage, adding their excrement to the mass of garbage. That such conditions must create a nuisance is beyond reasonable doubt. There are persons to be found in every community who are indifferent to the practical application of measures for promoting public health and for preventing conditions injurious to health, and such persons might honestly be of opinion that the conditions present in this case are not a menace to public health. Such views, however, cannot be allowed to prevail against expert testimony to the contrary.

On this appeal the appellants produced a number of affidavits challenging the correctness of the finding of a nuisance by the Provincial Board of Health, and intimated that the enlargement asked for was for the purpose of enabling them to obtain these affidavits. I have carefully read them, and, except that of Alexander Hugh Miller, they all are to the effect that the Provincial Board of Health was not justified in finding the existence of a

App. Div.
1918

RE
WATERLOO
LOCAL
BOARD
OF
HEALTH.

CAMPBELL'S
CASE.

Mulock, C.J.Ex.

App. Div.
1918
—
RE
WATERLOO
LOCAL
BOARD
OF
HEALTH.
—
CAMPBELL'S
CASE.
—
Mulock, C.J.Ex.

nuisance. The Act confers jurisdiction upon the Provincial Board of Health to determine that question, and there is no jurisdiction in the Court to try that question of fact. When it comes to enforcing the recommendation of the Provincial Board of Health, the Judge, before ordering abatement, may admit further evidence, but this provision does not mean that he may on further evidence set aside the finding of the Provincial Board, but that he may determine whether under all the circumstances an order for abatement should issue and if so upon what terms. Had the affidavits produced on the appeal been before the learned Judge, on the motion in question, for the reason above mentioned, he would not, I think, have been justified in attaching any weight to them, and therefore the appellants were not prejudiced by the refusal of an enlargement.

On the motion before the learned Judge, certain affidavits were filed in support of the finding of the Provincial Board of Health, and the appellants contend that they should have been allowed to cross-examine the persons who so testified. The question of nuisance had been determined by the Provincial Board of Health, and affidavits supporting the correctness of the finding by the Board were, I think, inadmissible, and, it may be assumed, had no weight with the learned Judge.

The excepted affidavit above mentioned, that of Alexander Hugh Miller, Clerk of the City of Kitchener, shews that the contract between the city and contractor for collection and disposal of garbage has been terminated, and that the garbage is now disposed of by incineration; and the affidavit of the appellant Campbell shews that since the 16th November, 1918, no garbage has been deposited on his farm. In his affidavit he says: "It will be an utter impossibility for me to remove the garbage and other refuse forthwith, as it took six months to deposit it there, and it will take an equally long time to remove it. Moreover, there is absolutely nothing there in an exposed condition which is dangerous to health."

The termination of the contract and the ceasing to deposit garbage on Campbell's land were not brought to the attention of the learned Judge. On the contrary, on the material before him, it appeared to him as if the depositing was continuing, and, according to the view of the Provincial Board of Health, it was necessary in

the interest of public health that that practice should promptly cease.

It having ceased, the only question is as to what direction should be made in respect of the garbage now in place. Under these circumstances, the order of the learned Judge may properly be varied by extending until the 1st April next the time in which to abate the nuisance, with the right to the appellants to apply for a further extension of time.

The second clause of the order should be amended by adding words preventing the feeding of hogs on the garbage so as to cause a nuisance.

For the city it is contended that the Riverside Garbage Disposal Company was an independent contractor, and therefore the city was not liable for the nuisance caused by the contractor's disposal of the garbage. The contract did not provide for its disposal, but simply for its collection and cartage to a point outside of the city limits. Whilst there in the contractor's hands it remained the property of the city and under its control; and, in the absence of express instructions, the contractor had implied authority as agent or servant of the city to dispose of it, and its disposal was made by the garbage company not *quâ* contractor but *quâ* agent or servant of the city, whereby the latter became liable for its wrongful disposal: *Dalton v. Angus* (1881), 6 App. Cas. 740; *Robinson v. Beaconsfield Rural District Council*, [1911] 2 Ch. 188.

For these reasons, I think that, subject to the variations in the order above indicated, the appeals should be dismissed, with costs of this appeal and of the motions made before Hodgins, J.A., and Ferguson, J.A.

Order varied.

App. Div.
1918

RE
WATERLOO
LOCAL
BOARD
OF
HEALTH.

CAMPBELL'S
CASE.

Mulock, C.J.Ex.

1918

[APPELLATE DIVISION.]

Dec. 18.

O'DELL v. TORONTO R.W. Co.

Negligence—Collision upon Highway of Automobile and Electric Street-car—Injury to Automobile and Driver—Action Brought by Driver—Addition of Owner as Co-plaintiff—Rule 134 (2)—Pleading—Judge's Charge—Findings of Jury—Operation of "Backing" Street-car—Control from Front—Question for Ontario Railway and Municipal Board—Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186—55 Vict. ch. 99, sched., cl. 36—Negligence of Conductor—"Misjudging Course of Automobile"—Failure of Driver of Automobile to Give Signal when Turning—Reversal of Judgment for Plaintiffs—Ground for New Trial not Shewn—Evidence of what Conductor Said Immediately after Collision—Inadmissibility.

The action was brought by O. to recover damages for loss and injury sustained by him in consequence of a collision of an automobile, which he was driving upon a highway, with an electric street-car of the defendants, which was backing in an easterly direction, the conductor standing on the back platform, which was thus in front, and the motorman operating the car at the other end. O. was going north, and turned to go west, thus meeting the backing street-car. The plaintiff, in his pleading, assigned, as grounds of negligence on the part of the defendants, want of warning and failure to stop in time owing to the defendants' servants not being "sufficiently attentive to duty." In the charge to the jury they were told that the negligence which the plaintiff complained of was that the defendants' servant might have stopped, but did not stop, the street-car when the vehicle driven by O. was in a position from which he had no power to escape. The jury found negligence, which, they said, "consisted in having the car controlled from the wrong end and in the conductor misjudging the course of the plaintiff's automobile." They negatived contributory negligence. O. and the conductor gave evidence at the trial. O. said that the conductor, when he saw that his car was going to run into O.'s vehicle, signalled the motorman by bell, "but the car kept coming;" and that the conductor told him (O.), immediately after the accident, that he (the conductor) had given the motorman the signal in plenty of time to stop, but the motorman "did not take it." This the conductor denied. O. did not pretend that he gave any warning of his intention to turn west—the local municipal by-law required a "visible and audible warning:"—

Held, that there was no evidence of negligence proper to be submitted to the jury—there was nothing more than "a mere surmise that there may have been negligence:" *Toomey v. London Brighton and South Coast R.W. Co.* (1857), 3 C.B.N.S. 146, 150; and the action should be dismissed.

- (2) The jury had gone beyond their province in finding that the street-car should have been controlled from the rear—that matter was under the control and direction of the Ontario Railway and Municipal Board: Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186; see also cl. 36 of the schedule to the defendants' Act of incorporation, 55 Vict. ch. 99.
- (3) There was no ground for directing a new trial: the accident was due to O.'s own fault or an unexpected failure of the engine of his automobile.
- (4) *Seem*, that what the motorman said to O. immediately after the trial was not admissible in evidence: *Wilson v. Botsford-Jenks Co.* (1902), 1 O.W.R. 101.
- (5) O.'s mother, who owned the automobile, was properly added as a plaintiff at the trial before the jury were charged, upon her consent in writing under Rule 134 (2).

AN appeal by the defendants from the judgment of the County Court of the County of Wentworth in favour of the plaintiffs for

the recovery of \$350 and costs, in an action in that Court, tried with a jury, brought to recover damages for injury and loss caused to the plaintiff Thomas B. O'Dell by a collision of an automobile, which he was driving upon a highway, with a street-car of the defendants. Martha O'Dell, the mother of Thomas B. O'Dell and the owner of the automobile, was added as a plaintiff at the trial.

App. Div.
1918

O'DELL
v.
TORONTO
R.W. Co.

October 18. The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and KELLY, JJ.

D. L. McCàrthy, K.C., for the appellants, argued that the acts found by the jury to be negligent did not make the appellants chargeable with negligence in a legal sense at all, and that the evidence did not disclose any grounds for holding them to be so chargeable. As to the contention that the car should have been controlled from the rear, that was a matter with which the jury had nothing to do, as it was a matter which was under the control of the Ontario Railway and Municipal Board. [He was stopped.]

W. Morison, for the plaintiffs, the respondents, argued that the findings of the jury were justified by the evidence, and disclosed actionable negligence on the part of the defendants. In any event, the Court should not go further than to direct a new trial. The automobile was proceeding very slowly, and on the right side of the road.

December 18. The judgment of the Court was read by RIDDELL, J.:—An appeal by the defendants from the judgment of the County Court of the County of Wentworth in favour of the plaintiffs for \$350 and costs.

The plaintiff Thomas B. O'Dell was driving an automobile north on the easterly side of Yonge street, Toronto, at a moderate rate; in front of him was a street-car going in the same direction; this car turned westerly on a "Y" on Woodlawn avenue, then took the north wing of the "Y" and backed toward Yonge street. The plaintiff also turned to the west and the car and his automobile came in collision with each other. In an action brought in the said County Court and tried at Hamilton, the jury found as follows:—

"Q. 1. Was the accident to the plaintiff due to the negligence of the defendants? A. Yes.

App. Div.
1918

O'DELL
v.

TORONTO
R.W. Co.

Riddell, J.

"Q. 2. In what did such negligence consist? A. The neglect consisted in having the car controlled from the wrong end and in the conductor misjudging the course of the plaintiff's automobile."

They negatived contributory negligence, and assessed the damages at \$350.

It appeared at the trial that the mother of Thomas B. O'Dell was the real owner of the car, although he had paid \$120 of his own money to repair it. The learned County Court Judge was asked, before the jury had been charged, to add the mother, Martha O'Dell, as a party plaintiff. This he finally did—of course in order to avoid troublesome questions of law as to the rights of a bailee and perhaps another action on the same facts. This order was moved against in this appeal, but it is plainly right: *Thompson v. Equity Fire Insurance Co.* (1908), 17 O.L.R. 214, affirmed by the Privy Council, S.C., [1910] A.C. 592, reversing the judgment of the Supreme Court of Canada, *Equity Fire Insurance Co. v. Thompson* (1909), 41 Can. S.C.R. 491. The mother's consent must have been given in writing: Rule 134 (2).

The substantial grounds for appeal are that the answers of the jury do not disclose actionable neglect, and that, in any event, there is no evidence to justify the finding of negligence.

To understand the two grounds of negligence, it will be well to consider the charge as well as the evidence and the pleadings. In the pleadings the grounds of negligence are (1) want of warning and (2) failure to stop in time owing to the defendants' servants not being "sufficiently attentive to duty;" in the charge it is said:—

"The negligence that is alleged is that when the plaintiff was in the position he has told you, going on Woodlawn avenue, the man in charge of the car backed his car, when the plaintiff was where he could not escape from it, and damaged his automobile. That is the negligence the plaintiff complains of: that the defendants' employee might have stopped the street-car when the plaintiff's car was in a position that he had no power to escape from, and that he did not do so. That is what is charged by the plaintiff."

What the learned Judge means by the "position" of the plaintiff, he shews later on in the charge:—

"The plaintiff says, to put it as briefly as I can, that the street-

car had run out to the upper end (i.e., the northerly limits) of the Y, where it passes the switch, so it goes back on the upper track and goes off down town again—you will know how that is—that when it passed up and stopped he saw it there when it stopped and he started on across the track to go on up Woodlawn avenue to the west, as he intended to do. It was across the north curve of this switch and in crossing that he had just got the front part of his automobile (the injury was not to the front part of the automobile), he had just got that part between the tracks, when the street-car, which was some few feet from him, commenced to back up, and as he was going up on low gear . . . he was going up hill at a slow pace, and he was unable to go fast enough to get by the track, and, as it turned out, the car struck him. He could not stay where he was, and he either had to go on or get hit, so he kept on.

“Now, if that is the position, you may think that if the street-car kept on its way and struck him there the management of the street-car was negligent at the time.”

In his evidence the plaintiff says that the car had come to a stop, he being 50 feet behind; that he turned his automobile to the west to cross the north limit of the Y; that, when the nose of his engine was on the track, the car started to back up at the ordinary rate of a street-car turning around, perhaps about 6 miles per hour; that the conductor “was on the job” and was looking; that he, the plaintiff, was on low speed, as he was going up hill; that, when the conductor saw that he was going to run into him, he gave the motorman the bell, but the car kept coming, and it hit the back wheel, the back fender, skidding him about 4 feet. He also says that the conductor told him immediately after the accident that he had given the motorman the bell in plenty of time to stop, but he did not take it. This the conductor denies, and it is doubtful how it could be received in evidence: *Wilson v. Botsford-Jenks Co.* (1902), 1 O.W.R. 101, and the cases cited on p. 102.

The jury seem to have considered that the street-car should have been controlled from the rear so that the conductor might himself have put on the brake, instead of from the front, leading to inevitable but dangerous delay.

App. Div.
1918

O'DELL
v.

TORONTO
R.W. Co.

Riddell, J.

App. Div.
1918
O'DELL
v.
TORONTO
R.W. Co.
Riddell, J.

But that is a matter with which a jury has nothing to do. It is under the control and direction of the Ontario Railway and Municipal Board: Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186; Act incorporating the Toronto Railway Company (1892), 55 Vict. ch. 99, schedule, p. 911, cl. 36; *Grand Trunk R.W. Co. v. McKay* (1903), 34 Can. S.C.R. 81, at pp. 87, 90, 91, 92, 97, 98, &c.; *Minor v. Grand Trunk R.W. Co.* (1917), 38 O.L.R. 646, especially at p. 649.

As to the other negligence found, viz., "in the conductor misjudging the course of the plaintiff," what the conductor says is:—

"Well, we had left the Y, left the spur, about 15 or 20 feet, when I saw this automobile approaching from the south-east corner of Yonge street to go across Woodlawn avenue, as I figured, waiting to come on on to the track going on to the north, but this automobile came across and started to go along Woodlawn; as I saw it come on across the track, I gave three bells to stop the car, because I saw there was no way of preventing an accident unless I did stop the car."

That is, the conductor, seeing the automobile coming from the south, believed that it was going to continue going north on Yonge street, but, instead of doing so, it turned to the west toward Woodlawn avenue.

The plaintiff says that he was going north at 5 or 6 miles an hour and turned to go west on Woodlawn avenue, but he does not pretend that he gave the "visible and audible warning" required by sec. V. of by-law No. 5770, or any kind of notice or warning that he intended to turn; and, unless the conductor were a mind-reader, it is hard to see how he should have been able to judge the course of the plaintiff.

I am unable to see how there was here even a *scintilla* of evidence, or anything more than "a mere surmise that there may have been negligence," which it has been held could not even be left to a jury: *Toomey v. London Brighton and South Coast R.W. Co.* (1857), 3 C.B.N.S. 146, at p. 150.

A suggestion rather than a motion was made that there might be a new trial. I can see no ground for such an order. The street-car was moving at a slow rate of speed, the gong was sounding, the plaintiff saw the street-car, no negligence which can be suggested was proved, and the accident was either due to the

plaintiff's own fault or an unexpected failure of the engine of his automobile.

The appeal should be allowed and the action dismissed with costs, if asked.

Appeal allowed.

App. Div.
1918

O'DELL
v.

TORONTO
R.W. Co.

Riddell, J.

[APPELLATE DIVISION.]

1918

Dec. 20.

STADDON V. LIVERPOOL-MANITOBA ASSURANCE CO.

Insurance (Fire)—Assignment of Property Insured without Written Permission of Company—Policy Void under Statutory Condition 3 (Ontario Insurance Act, sec. 194)—Insurance Effected by Owner—Sale and Conveyance to Purchaser and Mortgage Made to Grantor for Part of Purchase-money—Subsequent Conveyances of Equity of Redemption—Assignment of Policy by Original Owner (Mortgagee) to Transferee of Equity, with Loss Payable to Mortgagee as Interest may Appear—Consent by Company to Assignment—Effect of—Sec. 198 of Act—Subsequent Assignment by Mortgagee of Interest in Policy and all Moneys Payable thereunder to Owner Paying off Mortgage and Obtaining Discharge—Effect of.

By a policy of insurance, dated the 30th July, 1914, the defendant company insured G., his heirs, executors or administrators, for three years, to the amount of \$800, against loss or damage by fire to a building situate on land owned by G. After the issue of the policy, G. conveyed the land to a realty company, which reconveyed the same by mortgage to G. to secure payment of \$850, part of the purchase-price. Thereafter the realty company conveyed the equity of redemption to S., who in turn conveyed to P. To none of these conveyances did the defendant company give its written permission. On the 27th October, 1915, G. (by writing endorsed on the policy) assigned to P. all his "right, title, and interest in the policy and all benefits and advantages to be derived therefrom, with loss if any payable to me," that is, G., "as my interest may appear;" and the company, by writing endorsed on the policy, consented to the assignment. Subsequently P. conveyed the land, subject to G.'s mortgage, to A., who conveyed to the plaintiff. The consent of the defendant company was not given to either of these conveyances. On the 12th October, 1916, the insured building was destroyed by fire. The defendant company refused to pay the insurance money to the plaintiff. The plaintiff paid to G. the amount due upon the mortgage, obtained from G. an assignment of G.'s interest in the policy and in all moneys payable thereunder, and brought this action to recover the \$800 mentioned in the policy:—

Held, that, as the property insured had been assigned without a written permission endorsed upon the policy, the policy had become void, under statutory condition 3 (Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 194), and the plaintiff could not recover.

Per MULOCK, C.J.Ex.:—The view most favourable to the plaintiff was that the effect of G.'s assignment of the policy to P. and the defendant company's consent thereto was to create an insurance contract with P. as the assured, with loss payable to G. as his interest might appear. But, by the terms of the company's consent, G. became entitled only to intercept for his own benefit moneys otherwise recoverable by P.; and, inasmuch as P., having sustained no loss, could not recover, neither could G., whose title was derived from P., nor could the plaintiff, whose title was derived from G.

Per RIDDELL, J.:—The contention that the policy was not voided by the conveyances to the realty company, to S., and to P., because G. retained

App. Div.
1918

STADDON
v.

LIVERPOOL-
MANITOBA
ASSURANCE
Co.

an interest in the property under his mortgage, could not prevail. *Wade v. Rochester German Fire Insurance Co.* (1911), 23 O.L.R. 635, and *McQueen v. Phœnix Mutual Fire Insurance Co.* (1880), 4 Can. S.C.R. 660, distinguished. The conveyances, or "assignments," were sufficient to bring the case under statutory condition 3.

- (2) The policy was rendered null and void, but the defendant company might treat the contract as subsisting: Ontario Insurance Act, sec. 198. That was not the effect of its consent to the assignment by G. to P. Whether a novation was thus effected or a wholly new contract formed, there was a contract in favour of P. as the assured. G. was in no way an "assured."
- (3) The conveyances subsequent to the written consent made the policy void as against the owner of the equity of redemption. G. was affected by the conduct of the owner; at the time of the fire, the owner had no claim, and accordingly G. had no claim. *Livingstone v. Western Insurance Co.* (1869), 16 Gr. 9, *Chishom v. Provincial Insurance Co.* (1869), 20 U.C.C.P. 11, and *Pinhey v. Mercantile Fire Insurance Co.* (1901), 2 O.L.R. 296, approved and followed.
- (4) The plaintiff was not advantaged by the assignment made to him by G. after the fire.

Per KELLY, J.—Whatever may have been the effect of the consent to the assignment of the policy by G. to P., the assignments or transfers subsequently made, without notice to or consent by the company, had the effect of rendering the policy void under statutory condition 3, not only as against the plaintiff, but as against G. as well; for G. was not a mortgagee holding a contract of insurance of his interest as mortgagee; and the plaintiff's position was not improved by the assignment to him by G. after the fire.

An appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Essex dismissing an action brought in that Court to recover the amount of a loss by fire alleged to have been insured against by the defendant company. A policy was issued by the defendant company; but the company pleaded that the policy was void by reason of breaches of conditions.

October 18. The appeal was heard by MULOCK, C.J. Ex., RIDDELL, SUTHERLAND, and KELLY, JJ.

W. A. Smith, for the appellant, referred to May on Insurance, 4th ed., sec. 381, where it is stated that no transfer of interest will work a forfeiture under a clause in a policy forbidding such a transfer without the written consent of the insurance company, which does not so deprive the assignor of all insurable interest as to prevent his recovery on the policy for his benefit if that clause were not contained in it. That principle was the basis of the decision in *Caldwell v. Stadacona Fire and Life Insurance Co.* (1883), 11 Can. S.C.R. 212, and is applicable to the facts in this case. He referred also to *Wade v. Rochester German Fire Insurance Co.* (1911), 23 O.L.R. 635, and to *Keefer v. Phœnix Insurance Co. of Hartford* (1898-1901), 29 O.R. 394, 26 AR. 277, 31 Can. S.C.R. 144.

R. S. Robertson, for the defendant company, the respondent, argued that the principle relied on by the appellant did not protect either the plaintiff's interest or that of his grantors, and referred to *Joyce on Insurance*, 2nd ed., secs. 2304, 2305; *Burton v. Gore District Mutual Fire Insurance Co.* (1865), 12 Gr. 156, 161, approved in *Mitchell v. City of London Assurance Co.* (1888), 15 A.R. 262, 274; *Livingstone v. Western Insurance Co.* (1869), 16 Gr. 9.

Smith, in reply.

App. Div.
1918

STADDON
v.
LIVERPOOL-
MANITOBA
ASSURANCE
Co.

December 20. MULLOCK, C.J. Ex.:—This is an appeal from the judgment of the Judge of the County Court of the County of Essex dismissing the action. The material facts are as follows:—

By a policy of insurance, dated the 30th July, 1914, the defendant company insured one John Griffin, his heirs, executors or administrators, for three years, to the amount of \$800, against loss or damage by fire on a frame dwelling situate on land owned by Griffin. After the issue of the policy, Griffin sold and conveyed the lands, including the building, in fee simple, to the Caskey-Kamer Realty Company, which reconveyed the same by mortgage to Griffin to secure payment of \$850, part of the purchase-price.

Thereafter the Caskey-Kamer Realty Company sold and conveyed its equity of redemption in the lands to one Sova, and later Sova sold and conveyed the same to one Pulford. To none of these conveyances did the defendant company give its written permission. On the 27th October, 1915, Griffin assigned to Pulford, the then owner of the equity of redemption, the policy of insurance and all benefits thereunder, by an assignment in writing endorsed on the policy and worded as follows:—

"For value received, I hereby transfer, assign, and set over unto Charles Pulford, of Sandwich West (the purchaser), all my right, title, and interest in this policy of insurance and all benefits and advantages to be derived therefrom, with loss if any payable to me as my interest may appear.

"Witness my hand at Windsor, Ontario, this 27th day of October, 1915.

"John Griffin."

Beneath this assignment, the company, by its agent, consented to such assignment, by endorsement on the policy, in the following words:—

App. Div.
1918

STADDON
v.

LIVERPOOL-
MANITOBA
ASSURANCE
Co.

Mulock, C.J.Ex.

"The Liverpool-Manitoba Assurance Company hereby consents to the above assignment, dated October 27th, 1915, by John Griffin, of Windsor, Ont., interest in this policy to Charles Pulford, present owner, subject nevertheless to all the terms and conditions herein contained, with loss if any payable to said John Griffin as his interest may appear.

"October 27th, 1915.

P. Hangelde,

"Manager."

Subsequently Pulford conveyed the lands, subject to Griffin's mortgage, to Thomas and W. Affleck, and they conveyed the same to the plaintiff. The written consent of the defendant company was not given to either of the two last mentioned conveyances.

On the 12th October, 1916, the building was totally destroyed by fire, and the plaintiff applied to the defendant company for payment of the loss, but the company refused payment, on the ground that the insured property had been assigned without the written consent of the company, and that therefore the policy had become void under the terms of the third statutory condition, which is as follows:—

"If the property insured is assigned without a written permission endorsed hereon by an agent of the company duly authorised for such purpose, the policy shall thereby become void; but this condition does not apply to change of title by succession or by the operation of the law, or by reason of death."

On the company's refusal to pay the insurance moneys, the plaintiff paid to Griffin the amount owing upon his mortgage, and obtained from him an assignment of his interest in the policy and in all moneys payable thereunder, and as such assignee he now seeks to recover from the defendant company the sum of \$800 mentioned in the policy.

The learned trial Judge, in my opinion, rightly decided the case. It is unnecessary to determine whether, in view of the consent given by the company to the assignment of the policy by Griffin to Pulford, the company's liability ceased upon the conveyance of the assured premises by Griffin to the Caskey-Kamer Realty Company. But for the subsequent assignment of the policy and the consent thereto of the company, the conveyance of the insured premises to the Caskey-Kamer Realty Company terminated the insurance contract created by the policy. The view most favourable

to the plaintiff is that the effect of the subsequent assignment of the policy and the company's consent thereto was to create an insurance contract with Pulford as the assured, with loss payable to Griffin as his interest might appear.

With this as a starting point, the question is, what was the effect of the subsequent conveyance of the lands by Pulford to Thomas and W. Affleck subject to the mortgage to Griffin? By this conveyance Pulford denuded himself of all interest in the insured building. The company's contract was to the effect that the assured, to the extent of \$800, should suffer no loss or damage, that is, the company would indemnify him in respect of loss or damage by fire to his building to the extent of \$800. Having prior to the fire parted with all interest in the building, he suffered no loss or damage by its destruction, and therefore has no claim for indemnity, and is not entitled to maintain this action. Nor does the plaintiff stand in any better position than the assured. By the terms of the company's assent to the assignment of the policy to Pulford, with loss payable to Griffin, the latter became entitled simply to intercept for his own benefit moneys otherwise recoverable by Pulford; and, inasmuch as Pulford, having sustained no loss, cannot recover, neither can Griffin, whose title is derived from Pulford, nor can the plaintiff, whose title is derived from Griffin.

For these reasons, I think this appeal should be dismissed with costs.

SUTHERLAND, J., agreed with MULOCK, C.J. Ex.

RIDDELL, J.:—This is an appeal by the plaintiff from the judgment of the County Court of the County of Essex. The material facts are few and of frequent occurrence, and the law should be quite clear. By reason of the importance of the matters submitted we have thought it proper to reconsider the law. The facts (some of them immaterial) are as follows:—

1. On the 30th July, 1914, the defendant, a fire insurance company, issued a policy of insurance to John Griffin, agreeing to pay him, his heirs, executors or administrators, for damage up to \$800 by fire on a certain frame building (described) until noon of the 15th July, 1917. The policy contained the Ontario statutory conditions.

App. Div.
1918

STADDON
v.

LIVERPOOL-
MANITOBA
ASSURANCE
Co.

Mulock, C.J. Ex.

App. Div.
1918

STADDON
v.

LIVERPOOL-
MANITOBA
ASSURANCE
Co.

Riddell, J.

2. On the 9th September, 1914, Griffin conveyed the property on which the house stood, and accordingly the house itself, by a statutory deed, to the Laskey-Kamer Realty Company, for \$1,350 (registered on the 31st August, 1916, as No. 14023), taking from the purchasers a mortgage of the same date for \$850 for the balance of the purchase-money, registered on the 25th November, 1914, as No. 12120. These transactions were without express notice to the company, and the company gave no consent, written or otherwise, to the transfer, but Gagnier, the company's agent at Windsor, was the conveyancer who drew the documents. Nothing was said about the insurance, although Gagnier knew of its existence.

3. The Laskey-Kamer Realty Company sold to one Sauvé (the date is not given), without notice to the company, but with the knowledge of Griffin. Griffin was told by one Belleperche (a sub-agent under Gagnier, the company's agent at Windsor) to notify the company; he went to Gagnier's office and notified a lady clerk there and was told to bring in his policy.

4. Sauvé then sold to Charles Pulford (the date is not expressly stated, but apparently the 27th October, 1915). Griffin took the policy into Gagnier's office the same day as this transfer.

5. On the 27th October, 1915, in Gagnier's office, Griffin signed a transfer: "For value received, I hereby transfer, assign, and set over unto Charles Pulford, of Sandwich West (the purchaser), all my right, title, and interest in this policy of insurance and all the benefits and advantages to be derived therefrom, with loss if any payable to me as my interest may appear."

The agent, under authority given by the company, then signed a consent in the following terms:—

"The Liverpool-Manitoba Assurance Company hereby consents to the above assignment, dated October 27th, 1915, by John Griffin, of Windsor, Ont., interest in this policy to Charles Pulford, present owner, subject nevertheless to all the terms and conditions herein contained, with loss if any payable to said John Griffin as his interest may appear."

Griffin retained the policy in his possession. At this time Gagnier did not know of the mesne conveyance to Sauvé.

6. Pulford conveyed in fee subject to the mortgage to N. and T. Affleck (date not given.)

7. On the 4th August, 1916, the Afflecks conveyed to the plaintiff, subject to the mortgage to Griffin. Neither of these transfers was notified to or known by the company or its agent.

8. On the 12th October, 1916, a fire occurred, occasioning a total loss.

9. Griffin notified Gagnier, who repudiated the liability of the company, on the ground of change of ownership. His position was approved by the company.

10. The plaintiff paid off Griffin's mortgage.

11. On the 26th January, 1917, Griffin executed a formal assignment to the plaintiff of "all my right, title, and interest in the annexed policy of insurance . . . and all benefit and advantage to be derived therefrom and all moneys due or accruing due to me from the said company under said policy or otherwise."

12. The company refusing to pay, the writ in this action was issued on the 21st April, 1917.

The very careful arguments presented to us require the consideration of four questions:—

A. The effect of the conveyances before consent of the company given after the assignment of the policy to Pulford.

B. The effect of such assignment and consent.

C. The effect of the subsequent deeds of conveyance.

D. And the effect of the assignment by Griffin to the plaintiff.

A. It was confidently argued that the policy was not voided by the conveyances to the realty company, to Sauvé, and to Pulford, because Griffin retained an interest in the property under his mortgage: and *Wade v. Rochester German Fire Insurance Co.*, 23 O.L.R. 635, was cited for that proposition.

There it was held that an assignment for the benefit of creditors was not an assignment within the meaning of statutory condition 3, on the principle that the kind of assignment intended by the Act is one by which the assignor is divested of all right, title, and interest in the property assured. But in this, as in the earlier case in the Supreme Court of Canada, *McQueen v. Phœnix Mutual Fire Insurance Co.* (1880), 4 Can. S.C.R. 660, the *ratio decidendi* was that, while the assured transferred the legal title, his real pecuniary interest was not altered. "If the goods were destroyed by fire the creditors would receive their payment, and plaintiff so be relieved from his indebtedness, and plaintiff would receive the

App. Div.
1918

STADDON
v.

LIVERPOOL-
MANITOBA
ASSURANCE
Co.

Riddell, J.

App. Div.
1918

STADDON
v.

LIVERPOOL-
MANITOBA
ASSURANCE
Co.

Riddell, J.

surplus; if the goods had not been insured the whole loss would fall on the plaintiff, as he would lose his goods and still have to discharge his indebtedness to his creditors; so, though the assignment was made . . . if the goods were destroyed without insurance, plaintiff would be in the same position, and if destroyed . . . the result is just the same as if destroyed . . . before assignment, for . . . creditors will be entitled to receive only what is due them, and plaintiff will get the surplus. So that, as plaintiff was at the time of the making of the interim receipt interested to the whole value of the property and to the full amount assured in case of loss, so was he interested after the assignment and at the time of the loss:" *per* Ritchie, C.J., 4 Can. S.C.R. at pp. 676, 677.

"Although the assignors part with the title to the extent of passing the legal right to the assignee, they do not part with all their right and interest in it. They still retain rights and interests in the property, and . . . there is nothing to prevent the assignors, if their financial circumstances become so bettered as to enable them to do so, upon paying all claims of creditors and satisfying all demands properly arising under the instrument of assignment, from requiring the assignee to retransfer the property in specie. See *Ball v. Tennant* (1894), 21 A.R. 602, at p. 610:" *Wade v. Rochester German Fire Insurance Co.*, 23 O.L.R. at p. 640, *per* Moss, C.J.O.

It will be seen that these cases proceed upon the principle that the assignor is still in equity the owner of the assigned property, subject to a charge.

There is nothing of this kind where the owner of land sells it and takes a mortgage for part (or the whole) of the purchase-money; he remains or becomes, if you will, the owner in law, but ceases to be the owner in equity. He can by no means force his assignee to reconvey to him; the only interest he has in the land is to be paid his money; there is a complete change in the title. No doubt, a mortgagee has an insurable interest in such property, but his interest and his insurance are wholly different from those of an owner; for example, if a mortgagee insures his interest as mortgagee, the company upon payment of the loss becomes entitled to be subrogated to his rights against the mortgagor.

On principle, I think the assignments here were such as to bring the case under statutory condition 3.

No case was cited to us by either counsel on this point. It does not seem to have come up in our Courts, but it is not destitute of American authority. These seem to be all in the same sense: *Savage v. Howard Insurance Co.* (1873), 52 N.Y. 502; *Miner v. Judson* (1874), 2 Hun (N.Y.) 441; *Abbott v. Hampden Mutual Fire Insurance Co.* (1849), 30 Me. 414; *Home Mutual Fire Insurance Co. of Chicago v. Hauslein* (1871), 60 Ill. 521; *Dailey v. Westchester Fire Insurance Co.* (1881), 131 Mass. 173.

Nor will the existence (even if any did or could exist) of an equitable lien be of assistance: *California State Bank v. Hamburg-Bremen Insurance Co.* (1886), 71 Cal. 11.

I think, therefore, that statutory condition 3 applies, and that the company was relieved by the conveyances to the realty company and Sauvé.

B. The policy was rendered null and void, but any claim under it might still be paid, at the option of the company: Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 198; in other words, the company might treat the contract as subsisting.

By its consent to the assignment, the company recognised that Pulford was the owner of the property; on its own form it calls him "the purchaser" and "present owner," and recognises the policy as still existing, with the name of Pulford substituted for that of Griffin. Pulford is "the insured," and it is to him, his heirs, executors or administrators, that the money is now to be paid. It seems to me that it is of no consequence whether this should be called an entirely new contract or whether the doctrine of novation could be invoked; in any case it is a policy in favour of Pulford as the insured.

The provision "with loss if any payable to said John Griffin as his interest may appear" simply authorises the company to pay to Griffin the amount of his interest in the property, i.e., the amount of his mortgage: *McQueen v. Phoenix Insurance Co.*, 4 Can. S.C.R. 660; it in no way makes the policy double, insuring Griffin to the amount of his mortgage charge and Pulford for the remainder of the insurance moneys: *Mitchell v. City of London Assurance Co.*, 15 A.R. 262; *Livingstone v. Western Insurance Co.*, 16 Gr. 9; *Caldwell v. Stadacona Fire and Life Insurance Co.*, 11 Can. S.C.R. 212. There would be no difficulty in drawing a policy with that effect, a double policy; but it is sufficient to say that it would be different from this policy, a single policy.

App. Div.
1918

STADDON
v.
LIVERPOOL-
MANITOBA
ASSURANCE
Co.
Riddell, J.

App. Div.
1918

STADDON
v.
LIVERPOOL-
MANITOBA
ASSURANCE
Co.

Riddell, J.

Whether what was done be called novation or the formation of a wholly new contract, the effect is the same. Pulford is insured, loss payable to Griffin to the extent of his interest; in other words, the money (to the extent of Griffin's interest), which would without this provision as to payment to him have been payable to Pulford, is to be paid to Griffin. It is payable to Griffin because it would otherwise be payable to Pulford; and he has directed the payment to Griffin.

C. That the conveyances subsequent to the written consent made the policy void as against the owner of the equity of redemption cannot be disputed. Pulford had an interest at the time of the fire, and neither of his grantees, the Afflecks, nor their grantee, the plaintiff, is contracted with: none of them is an heir, executor or administrator, of Pulford. But it is contended that Griffin is not affected by the assignments. That is on the hypothesis that Griffin is in some way an insured. We have seen that that view cannot be supported. Authority on that point is not wanting. The Court of Error and Appeal in this Province expressly held, in *Livingstone v. Western Insurance Co.*, 16 Gr. 9, that, where a fire policy in favour of a mortgagor contained a clause providing for the loss being payable to the mortgagee, the mortgagee's claim was destroyed by a breach of the conditions of the policy which would void the policy as against the mortgagor, i.e., the insured. *Chishom v. Provincial Insurance Co.* (1869), 20 U.C.C.P. 11, is to much the same effect. In Quebec there is *Migner v. St. Lawrence Fire Insurance Co.* (1900), Q.R. 17 S.C. 586 and 10 K.B. 122. Then we have the recent decision of the present Chief Justice of Ontario in *Pinhey v. Mercantile Fire Insurance Co.* (1901), 2 O.L.R. 296.

It is plain on both principle and authority that Griffin was affected by the conduct of the owner of the equity of redemption; that, at the time of the fire, the owner had no claim, and accordingly Griffin had no claim.

D. The only possible hypothesis on which it was or could be argued that Griffin passed anything by the assignment to the plaintiff was that of an insurance of his interest as mortgagee, and not affected by an assignment of the property. That we have already seen was not existent; it was the property, not the interest, of the mortgagee which was insured. Gwynne, J., shews the difference

in the *Chishom* case, 20 U.C.C.P. at p. 13. But, even if there was such an insurance, the company, on being called on to pay the amount of the loss to Griffin, would be entitled to the advantage of the mortgage.

(Of course, in the case of insurance upon the property payable to a mortgagee as his interest may appear, the mortgagor, having effected the insurance, has the right, in paying off the mortgage, to have the advantage of the insurance.)

The advantage to which it would be thus entitled Griffin disabled himself from giving the company before the assignment, and thereby lost any right he might otherwise have had. Even had he not discharged his mortgage, the company, on paying to him the amount of the mortgage, would become entitled to receive as much from the plaintiff: *Savage v. Howard Insurance Co.*, 52 N.Y. at p. 508. This would leave matters as they were; in no case could the plaintiff be advantaged.

The appeal should be dismissed with costs.

KELLY, J.:—In my opinion the result arrived at by the learned Judge who tried this action is correct.

Number 3 of the statutory conditions, which are to be printed on every policy (the Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 194), is in positive language:—

“If the property insured is assigned without a written permission endorsed hereon by an agent of the company duly authorised for such purpose, the policy shall thereby become void; but this condition does not apply to change of title by succession or by the operation of the law, or by reason of death.”

Here the change of title was not by succession or by the operation of the law or by reason of death. Whatever may have been the effect of the consent by the respondent's agent to the assignment by Griffin to Pulford on the 27th October, 1915, need not, in the view I take of the matter, be now considered; the assignments or transfers subsequently made, without notice to or consent by the company, having the effect of rendering the policy void under statutory condition 3, not only as against the plaintiff but as against Griffin, the mortgagee, as well, whose position was not that of a mortgagee holding a contract of insurance of his interest as mortgagee, but as a holder of a mortgage with an authorisation to the

App. Div.
1918

STADDON
v.

LIVERPOOL-
MANITOBA
ASSURANCE
Co.

Riddell, J.

App. Div.
1918

STADDON
v.

LIVERPOOL-
MANITOBA
ASSURANCE
Co.

Kelly, J.

company to pay to him out of the insurance moneys to the extent of his interest.

Counsel for the appellant contended on the argument that the respondent, by consenting to the transfer from Griffin to Pulford, waived the right to object; that, however, could not apply to the case of the subsequent transfers, which were made without the company's consent.

Moreover, the policy being void under the statutory condition referred to, and Griffin not being insured as mortgagee, the plaintiff's position is not improved by the assignment to him by Griffin of all the latter's right, title, and interest in the policy and all benefit and advantage to be derived therefrom, and all moneys due and accruing due to the assignor from the company "under said policy or otherwise."

There is undoubtedly laxity at times in the matter of obtaining the consent of insurance companies upon a conveyance or transfer of property on which insurance exists, and the result of the present litigation may in some quarters cause surprise.

I am of opinion, however, that the judgment appealed from is based upon authority, and that it should be sustained, and the appeal be dismissed with costs.

Appeal dismissed.

1918

[APPELLATE DIVISION.]

Dec. 20.

TEMISKAMING TELEPHONE CO. LIMITED v. TOWN OF COBALT.

Telephone Company—Right to Maintain Poles and Wires in Streets of Town—Powers Given by Letters Patent Incorporating Company—Consent of Town Corporation to Exercise of Powers—Agreement Authorised by By-Law of Town Council—Powers of Council—Municipal Amendment Act of 1906, 6 Edw. VII. ch. 34, sec. 20—Construction of Agreement—Absence of Limitation as to Time—"Term"—"Franchise."

The judgment of MIDDLETON, J., 42 O.L.R. 385, was reversed, and it was held (RIDDELL and LATCHFORD, JJ., dissenting), that the plaintiff company was entitled to maintain its telephone wires in the public streets of the town of Cobalt.

In the view of the majority of the Court, the powers given to the company, by the letters patent incorporating it, were unlimited as to time; and, upon the true construction of the agreement between the parties of the 19th June, 1912, the consent of the town corporation to the exercise of the company's powers within the town was also unlimited as to time, although the exclusive right given by clause 7 was limited to 5 years.

The town council had power, under the Municipal Amendment Act of 1906, 6 Edw. VII. ch. 34, sec. 20, to pass the by-law authorising the agreement; and that section puts no limit on the time during which the right which the council by such a by-law may give shall extend.

Per RIDDELL and LATCHFORD, JJ.:—Clause 9 of the agreement provides that the “company shall not during the term of said franchise charge more than” certain rates. The “said franchise” can refer only to the right given by clause 1 to the plaintiff company, of “exercising its powers by constructing, maintaining, and operating its lines of telephone;” and that this “franchise” has a “term” is expressly stated by clause 9.

App. Div.
1918

TEMIS-
KAMING
TELEPHONE
Co.
LIMITED
v.
TOWN OF
COBALT.

AN appeal by the plaintiff company from the judgment of MIDDLETON, J., 42 O.L.R. 385.

October 3. The appeal was heard by MULOCK, C.J.Ex., RIDDELL, LATCHFORD, SUTHERLAND, and KELLY, JJ.

I. F. Hellmuth, K.C., for the appellant company. The company's charter gave it perpetual powers, which could not be restricted as to time or otherwise except by competent authority. The town corporation, by the first clause of its agreement, consented to the company exercising these powers within its limits without restriction as to time, and so the consent was perpetual. There is nothing in any other part of the agreement to contradict this. Clause 7 simply gives a monopoly except as to the Railway Commission. The 5 years mentioned in clause 8 do not refer at all to the consent given in clause 1. Nor do the words “during the term of the said franchise” in clause 9 mean the period of 5 years mentioned in clause 7, but mean the franchise created by the letters patent. The municipal council had authority to pass the by-law for giving the consent in clause 1: Municipal Amendment Act of 1906, 6 Edw. VII. ch. 34, sec. 20 (O.); *Hull Electric Co. v. Ottawa Electric Co.*, [1902] A.C. 237; *Township of Bucke v. New Liskeard Light Heat and Power Co.* (1909), 1 O.W.N. 123.

W. N. Tilley, K.C., and *H. H. Dewart, K.C.*, for the defendant town corporation, respondent. The contract, taken as a whole, was a contract for 5 years only. The consent given, being a mere permission, was revocable: *British Columbia Electric R.W. Co. Limited v. Stewart*, [1913] A.C. 816, 14 D.L.R. 8. The 5-year limit in clause 8 restricts the consent in clause 1. Then see clause 9, where the phrase “during the term of the said franchise” occurs. This undoubtedly means the period of 5 years referred to in clause 7. So the general terms of clause 1 are qualified, as to

App. Div.
1918

TEMIS-
KAMING
TELEPHONE
Co.
LIMITED

v.
TOWN OF
COBALT.

Mulock, C.J.Ex.

the time for which the consent was given, by the terms of clauses 7 and 9.

Hellmuth, in reply.

December 20. MULOCK, C.J.Ex.:—This is an appeal from the judgment of Middleton, J., 42 O.L.R. 385, 43 D.L.R. 724, and the sole question is, whether the plaintiff company is entitled to maintain its telephone lines on the public streets of the town of Cobalt. By letters patent granted by the Lieutenant-Governor in Council, under the Ontario Companies Act, the plaintiff company was incorporated as a telephone company, “with power to carry on within the district of Nipissing the general business of a telephone company, and for that purpose to construct, erect, maintain, and operate a line or lines of telephone along the sides of, or across, or under any public highways, roads, streets, bridges, waters, watercourses, or other places, subject however to the consent to be first had and obtained and to the control of the municipal councils having jurisdiction in the municipalities in which the company’s lines may be constructed and operated, and to such terms, for such times, and at such rates and charges, as to such councils shall be granted, limited, and fixed, for such purposes respectively.”

The town of Cobalt is situate within the district of Nipissing, but had not been incorporated when letters patent issued; and, without municipal consent, the company erected telephone lines on streets then in the said district and now in the said town. It also acquired from a certain other telephone company, the Haileybury and Cobalt Telephone Company, telephone lines erected by that company on streets in the said district (now in Cobalt), and now claims the right to maintain and operate all of those lines on the public streets of Cobalt.

Authorised by by-law of its municipal council, the Corporation of the Town of Cobalt, on the 19th June, 1912, entered into an agreement with the plaintiff company, which agreement is in the words following:—

“This indenture, made in duplicate this 19th day of June in the year of our Lord one thousand nine hundred and twelve, between the Temiskaming Telephone Company Limited, hereinafter called ‘the company,’ of the first part, and the Municipal Corporation

of the Town of Cobalt, hereinafter called 'the town,' of the second part, witnesseth that:—

"Whereas the company is about to make such changes to its system at the town of Cobalt and in the neighbourhood thereof as will enable it to secure a long distance connection for its subscribers at that exchange, and has expended a considerable sum to that end, and intends making further expenditure for that purpose, and has petitioned the town before the expenditure of any further sum to make definite the rights of the company to the use of the streets of the town:—

"Now the parties hereto, in consideration of the premises, for themselves, their successors and assigns, do mutually covenant and agree as follows:—

"1. The town hereby consents to the company exercising its powers by constructing, maintaining, and operating its lines of telephone upon, along, across, or under any highway, square, or other public place within the limits of the town, provided the opening up of such highway, square, or other public place for the erection of poles, or for carrying wires underground, shall be done under the direction and supervision of the town engineer, or such other officer as the town may appoint, and that the surface of such street or other public place shall in all cases be restored to its former condition by and at the expense of the company.

"2. The company will indemnify and save harmless the said town, its officers and servants, from all manner of loss, damage, injuries, suits, claims and demands on account of the said telephone system either in the erection or operation thereof.

"3. The company shall not remove, cut, or trim any shade-tree within the town, without the consent of the town engineer or other officer appointed by the council, and without reasonable notice to the adjoining owner or tenant, if resident, and shall be responsible for all damage through such removal, cutting, or trimming.

"4. The company shall maintain an all-night telephone service in connection with its exchange in said town, and shall operate and maintain its system in accordance with such of the provisions of the Ontario Telephone Act and amendments thereto as apply to it.

App. Div.
1918

TEMIS-
KAMING
TELEPHONE
Co.
LIMITED
v.
TOWN OF
COBALT.

Mulock, C.J.Ex

App. Div.

1918

TEMIS-
KAMING
TELEPHONE
Co.

LIMITED

v.

TOWN OF
COBALT.

Mulock, C.J.Ex.

"5. The company will have its rates ratified by the Ontario Railway and Municipal Board and will make no change in its rates without the consent of the said Board.

"6. The company agrees to permit the town to use one gain on every pole erected and one duct in all underground conduits laid in the town for the use of the fire alarm system of the town or of any police patrol system the town may install, and the company agrees to keep the same in repair and supply all necessary material for such repair, free of charge.

"7. The town agrees that it will not, during the period of 5 years from the 19th day of June, 1912, give to any person, firm, or company (other than the Temiskaming and Northern Ontario Railway Commission and the Temiskaming Telephone Company Limited) any license or permission to use any highway, square, or other public place within the limits of the town for the purpose of placing in, upon, over, or under any such highway, square, or other public place, any poles, ducts, or wires for the purpose of carrying on a telephone business.

"8. The company agrees every year during said period to give the town credit on any amount due the company by the town, either for rental of telephones contracted for by the town or for the upkeep of police patrol or fire alarm systems installed by the town, for a sum being 3 per cent. of the amount received by the company during such year for the gross rental of telephones within such town.

"9. That the said company shall not during the term of said franchise charge more than \$40 per year for a business wall telephone and \$20 per year for a private wall telephone in said municipality.

"10. The company hereby agrees to use its utmost endeavours to obtain a connection between its system at Cobalt and the long distance telephone system of the Temiskaming and Northern Ontario Railway and the Bell Telephone Company of Canada Limited; this covenant to be without prejudice to the right of the town to compel the company to do so under the Municipal Act, 1912.

"11. In as far as this agreement varies the agreement entered into between the parties hereto and dated August 15th, 1910, the terms of such last mentioned agreement so varied shall cease to have any effect."

(The respective seals of the company and the municipal corporation and the signatures of the vice-president and secretary-treasurer of the company and the mayor and clerk of the town were duly affixed.)

The council's authority to pass the by-law authorising this agreement is derived from an Act of the Legislature of Ontario, being 6 Edw. VII. ch. 34 (Municipal Amendment Act of 1906), sec. 20, which enacts that the councils of cities, towns, villages and townships, may pass by-laws "for permitting and regulating the erection and maintenance of electric light, power, telegraph and telephone poles and wires upon the highways or elsewhere within the limits of the municipality."

The Corporation of the Town of Cobalt, contending that the agreement authorised the company to maintain its lines on the streets for 5 years only, was proceeding to remove the same from the streets, but was restrained by injunction; and we are now called upon to construe the agreement above set forth.

By the first clause of the agreement the town "consents to the company exercising "its powers" by constructing, maintaining, and operating its lines of telephone upon, along, across, or under any highway, square, or other public place within the limits of the town," etc. The "powers" here referred to are those given to the company by its letters patent, some of which are above set forth. The letters patent imposed no time-limit within which such powers might be exercised, and therefore they continue until terminated by competent authority. These powers the town consented to the company exercising on the streets of Cobalt; and such consent, being unqualified, must be construed as not limited as to time.

The Legislature having, by the Ontario Companies Act, delegated to the Lieutenant-Governor in Council authority by letters patent to create corporations and to endow them with certain powers, the granting of such letters patent is a legislative act, and the same construction must be placed on the language used in the letters patent as would be placed on the same language if in a private Act incorporating the company and creating its powers. When Parliament creates a corporation, authorises it to carry on an undertaking, and clothes it with powers which, in the opinion of Parliament, are necessary or proper for the purpose of

App. Div.
1918

TEMIS-
KAMING
TELEPHONE
Co.

LIMITED

v.

TOWN OF
COBALT.

Mulock, C.J.Ex.

App. Div.
1918
—
TEMIS-
KAMING
TELEPHONE
Co.
LIMITED
v.
TOWN OF
COBALT.
—
Mulock, C.J.Ex.

the undertaking, and fixes no limitation to the duration of such powers, they continue (unless a contrary intention appears in the Act) forever, which is another way of saying so long as the corporation retains its corporate existence, and the same interpretation applies to incorporation by letters patent. Here the letters patent enabled the municipal councils to prevent the exercise of the company's powers on the public streets by withholding consent to their user, or to qualify such consent, amongst other respects, by fixing a time-limit. There being no time-limit qualifying the consent given the company, it authorises the company to exercise its powers in respect of the streets so long as the powers exist.

In the first clause of the agreement, in clear and unambiguous language, consent is given to the company to exercise "its powers" on the public streets without any limitation as to time, that is, for all time; and I am unable to find in any part of the agreement anything repugnant to or raising any doubt as to this being its plain intent and meaning.

In addition to this consent, the defendant corporation, by clause 7, agrees, for a period of 5 years, not to give, except to the Temiskaming and Northern Ontario Railway Commission, any license or permission to use the streets for poles, ducts, or wires for the purpose of carrying on a telephone business. There is no conflict between these two clauses, and full effect can be given to both of them, the company being entitled by clause 1 to use the streets for all time, and by clause 7 to freedom for 5 years from any rival except the Railway Commission.

It was argued that the 5-year limit mentioned in clause 8 also limited to the same period the consent given by clause 1. I am unable to assent to this view. The two clauses are wholly independent of each other. Clause 8 simply provides that during each year of the period of 5 years the company shall credit on any indebtedness of the town a sum equal to 3 per cent. of its gross revenue in such year. At the end of the 5 years, the company is relieved from such obligation; but the clause is not open to the construction that, because the company is not bound to continue such credit after the 5 years, therefore the consent given by clause 1 is also to terminate then. If such was the intention of the parties, it would doubtless have been so stated in the agreement.

It has not been and it is not the privilege of the Court to make a new bargain for the parties, by reading into the agreement a term which the parties themselves did not incorporate in it. It was also argued that the words "during the term of said franchise," used in clause 9, meant "the period of 5 years," and had the effect of limiting to 5 years the consent mentioned in clause 1. When the parties were framing clause 8, and intended its provisions to continue for 5 years only, they manifested such intention by using apt words, "during such period" (that is, the period of 5 years mentioned in clause 7.) If that same period of 5 years had been intended to apply to the provisions of clause 9, one might reasonably have expected to find the like or similar language used in its application there, and not the words "during the term of said franchise," which mean something very different.

The word "franchise" here referred to can have but one meaning, namely, the franchise created by the letters patent, including the powers in perpetuity thereby conferred on the company. It acquired no powers from the Corporation of Cobalt, which could neither enlarge nor diminish any of the company's powers—their only source being the Lieutenant-Governor in Council. The dominant idea suggested by the words "during the term of said franchise" is that of a period of time co-extensive with the existence of the company. During such period, not the limited period of 5 years, the Cobalt telephone users are to enjoy protection against higher rates. How are they after 5 years to enjoy this advantage if the consent ends in 5 years, and the company must then cease business in Cobalt? This provision in clause 9, entitling the citizens of Cobalt to the use of telephones, at rates not higher than those set forth in the clause, during the lifetime of the franchise, makes it abundantly clear, if it otherwise admitted of any doubt, that the consent given by clause 1 to maintain telephone lines on the streets was also intended to continue during the lifetime of the company's franchise.

For these reasons, I am of opinion that the Corporation of the Town of Cobalt is not entitled to cause the company's poles etc. to be removed from its streets, and that this appeal should be allowed with costs, and that the judgment below should be set aside with costs, and in lieu thereof that judgment should be entered declaring the plaintiff company entitled to maintain and

App. Div.
1918.

TEMIS-
KAMING
TELEPHONE
Co.
LIMITED
v.
TOWN OF
COBALT.

Mulock, C.J.Ex.

App. Div.
1918
—
TEMIS-
KAMING
TELEPHONE
Co.
LIMITED
v.
TOWN OF
COBALT.
—
Kelly, J.

operate its telephone system on the public streets of the town, and restraining the defendant corporation from interfering with such right; the defendant corporation to pay the plaintiff company's costs of the action.

SUTHERLAND, J., agreed with MULOCK, C.J.Ex.

KELLY, J.:—By a judgment of Mr. Justice Middleton of the 21st March, 1918, he dismissed the action brought by the plaintiff company to establish its right to maintain and operate its telephone system in the town of Cobalt. The appeal is from that judgment.

The town of Cobalt is situate in the township of Coleman, formerly in the district of Nipissing, now in the district of Temiskaming. Instructions were given on the 16th May, 1904, for the survey of that township; the survey was made and the plan thereof is dated the 1st October, 1904. The township was not organised, however, until the 14th April, 1906. On the 5th July, 1905, the plaintiff company was incorporated. By an order in council of the 19th January, 1906, the "townsite," as shewn upon the survey, was vested in the Temiskaming and Northern Ontario Railway Commission. On the 1st December, 1906, the Town of Cobalt was incorporated. On the 4th April, 1905, the Haileybury and Cobalt Telephone Company was incorporated, but it went into liquidation, and its assets were sold to the plaintiff company on the 15th April, 1906, telephone lines having prior thereto been constructed by both of these companies across portions of the land now included in the town.

The above facts I have taken from the reasons for judgment of the trial Judge.

By its charter of incorporation, the plaintiff company was given power "to carry on within the district of Nipissing the general business of a telephone company, and for that purpose to construct, erect, maintain, and operate a line or lines of telephone along the sides of, or across, or under any public highways, roads, streets, bridges, waters, watercourses, or other places, subject however to the consent to be first had and obtained and to the control of the municipal councils having jurisdiction in the municipalities in which the company's lines may be constructed and

operated, and to such terms, for such times, and at such rates and charges, as by said councils shall be granted, limited, and fixed, for such purposes respectively."

The part of the district of Nipissing in which the township of Coleman is situated became a part of the district of Temiskaming subsequent to the incorporation of the company.

After the Town of Cobalt was incorporated, additional telephone lines were constructed within the town-limits, but without the consent or approval of the municipality or the council thereof. In June, 1912, an agreement was entered into between the plaintiff and defendant, and authorised by by-law No. 202 of the town, by which the town consented to the plaintiff exercising certain of its powers within the limits of the town. Upon this agreement also the plaintiff now relies.

There had been an earlier agreement of the 2nd April, 1910, which is not of importance here except as indicating the attitude of the defendant at that time in respect of any possible rights of the plaintiff or the assertion of such rights. One of its provisions is that the company "grants, permits, and allows" the defendant (the Corporation of the Town of Cobalt) to string the wires of the electric fire alarm system and to place fire alarm boxes in connection with the system on the telephone poles of the company in the town; but it expressly provides that the agreement shall not be construed in any way as an admission by the corporation (the town) that the company "has any right, privilege, or franchise of any kind whatsoever to erect the telephone poles of the said company in the streets of the town of Cobalt or to string wires or other apparatus thereon."

The agreement of the 19th June, 1912, recites that "whereas the company is about to make such changes to its system at the town of Cobalt and in the neighbourhood thereof as will enable it to secure a long distance connection for its subscribers at that exchange, and has expended a considerable sum to that end, and intends making further expenditure for that purpose, and has petitioned the town before the expenditure of any further sum to make definite the rights of the company to the use of the streets of the town."

The parts of this agreement to which the plaintiff now attaches special importance are clauses 1 and 7:—

App. Div.
1918

TEMIS-
KAMING
TELEPHONE
Co.
LIMITED

v.
TOWN OF
COBALT.

Kelly, J.

App. Div.
1918

TEMIS-
KAMING
TELEPHONE

Co.
LIMITED

v.
TOWN OF
COBALT.

Kelly, J.

"(1) The town hereby consents to the company exercising its powers by constructing, maintaining, and operating its lines of telephone upon, along, across, or under any highway, square, or other public place within the limits of the town, provided the opening up of such highway, square, or other public place for the erection of poles, or for carrying wires underground, shall be done under the direction and supervision of the town engineer, or such other officer as the town may appoint, and that the surface of such street or other public place shall in all cases be restored to its former condition by and at the expense of the company."

"(7) The town agrees that it will not, during the period of 5 years from the 19th day of June, 1912, give to any person, firm, or company (other than the Temiskaming and Northern Ontario Railway Commission and the Temiskaming Telephone Company Limited) any license or permission to use any highway, square, or other public place within the limits of the town for the purpose of placing in, upon, over, or under any such highway, square, or other public place, any poles, ducts, or wires for the purpose of carrying on a telephone business."

There are other provisions as well which are urged as helpful in interpreting the real meaning of the agreement as a whole and particularly of clause 1.

The company, being a creature of statute, has not and had not inherent powers, but only such as were conferred upon it by its charter of incorporation and the legislation which authorised the issue of the charter. These powers are not exercisable regardless of the rights of the municipalities or places in which the company desires to carry on the business which the charter clothed it with power to carry on.

Particularly is that so when, as in the present case, it is expressly declared that the charter-powers are subject to the consent being first obtained of the municipal councils having jurisdiction in the municipalities in which the company's lines may be constructed and operated, and also to the control of these councils.

There is a clear distinction between the "powers" which were vested in the company by its charter, and the "right" to exercise these powers.

I am of opinion that this company had not the right to exercise the powers conferred upon it within the municipality into which it

extended its operations, unless with the consent previously obtained from the council of that municipality: without that consent, such operations were unauthorised.

So far, therefore, as the plaintiff relies alone upon the provision of its charter for the right to exercise its powers in what is now the town of Cobalt, it cannot succeed.

From anything that appears in the material before us, the necessary consent had not been obtained down to the 19th June, 1912.

In determining what rights, if any, the agreement conferred upon the plaintiff two important considerations arise: (1) as to the power the municipal council then had to give consent or permission to the company maintaining and operating its lines within the municipality; and (2) if the municipal council possessed such power, then as to the extent to which such consent or permission was given.

The council of the municipality had no inherent power to grant the permission or give the consent which would confer upon the company the right to exercise its charter-powers within the municipality, but depended for that power upon express legislative enactment.

By sec. 559 of the Municipal Act, R.S.O. 1897, ch. 223, by-laws may be passed by the councils of cities, towns, and villages (4) "for regulating the erection and maintenance of electric light, telegraph and telephone poles and wires within their limits." This was re-enacted in the Municipal Act of 1903, 3 Edw. VII. ch. 19, as sec. 559 (4), and was repealed in 1906 by 6 Edw. VII. ch. 34, sec. 20, which enacts that councils of cities, towns, villages, and townships may pass by-laws for "permitting and regulating the erection and maintenance of electric light, power, telegraph and telephone poles and wires upon the highways or elsewhere within the limits of the municipality."

Sections 330 and 331 of the Municipal Act of 1903, 3 Edw. VII. ch. 19, deal with the granting by the councils of municipal corporations of monopolies. Section 330 provides as follows:—

"Subject to the provisions of sections 331 and 332 of this Act no council shall have the power to give any person an exclusive right of exercising, within the municipality, any trade or calling, or to impose a special tax on any person exercising the same, or to

App. Div.

1918

TEMIS-
KAMING
TELEPHONE
Co.
LIMITED
v.
TOWN OF
COBALT.
Kelly, J.

App. Div.
1918
—
TEMIS-
KAMING
TELEPHONE
Co.
LIMITED
v.
TOWN OF
COBALT.
—
Kelly, J.

require a license to be taken for exercising the same, unless authorised or required by statute so to do; but the council may direct a fee, not exceeding \$1, to be paid to the proper officer for a certificate of compliance with any regulations in regard to such trade or calling."

Section 331, sub-sec. (1):—

"The council of every city, town and village may pass by-laws, granting from time to time, to any telephone company, upon such terms and conditions as may be thought expedient, the exclusive right within the municipality, for a period not exceeding 5 years at any one time, to use streets and lanes in the municipality for the purpose of placing in, upon, over or under the same, poles, ducts and wires for the purpose of carrying on a telephone business, and may on behalf of the municipal corporation, enter into agreements with any such company not to give to any other company or person for such period any license or permission to use such streets or lanes for any such purpose; but no such by-law shall be passed, nor shall any such agreement be entered into without the assent of two-thirds of the members of the council of the municipality being present and voting therefor.

"(2) Nothing in the preceding sub-section contained, or done by virtue thereof, shall limit or prejudicially affect any rights of any telephone company with respect to the use of streets or lanes for the purposes aforesaid, which existed on the 27th day of May, 1894, nor shall the preceding sub-section or any by-law passed or agreement made before the said date, prevent any municipal council from granting to any person permission to use streets or lanes for the purpose of a private telephone line for the use of such person, his servants, clerks or agents, or persons communicating with them."

(Sub-section 3 of sec. 331 and sec. 332 are not material here.)

When the agreement of the 19th June, 1912, was made, these two sections (330 and 331) and sec. 20 of 6 Edw. VII. ch. 34 were in force. Section 331 was repealed by the Ontario Telephone Act, 2 Geo. V. ch. 38, sec. 39, and by sub-sec. 1 of sec. 8 of that Act it was enacted:—

"The council of every municipality may in the case of a county or a township with the approval of the Ontario Railway and Municipal Board, and in the case of any other municipality with

the assent of the municipal electors, pass by-laws for granting to a telephone company, upon such terms and conditions as may be deemed expedient, the right to use any of the highways, squares, or lanes in the municipality for placing in, upon, over or under the poles, cables, ducts and other wires for the purpose of its business."

Section 20 of 6 Edw. VII. ch. 34 is wider in its effect than the section for which it was substituted, and authorises councils to pass by-laws to "permit" as well as to "regulate," and it puts no limit upon the time during which the right given by the council by such by-laws shall extend.

The respondent's argument proceeded along the line that the general terms of clause 1 of the agreement are qualified, as to the time for which its consent was given, by the terms of clause 7, assisted by the provisions in clause 9.

These two clauses (1 and 7) deal with separate and independent matters, and are not necessarily to be read together, except in so far as clause 7 gives to the appellant the added advantage of an exclusive right within the town for 5 years. Standing by itself, clause 1 puts no limit upon the time for which the town's consent was given, and the evident purpose of clause 7 was not to cut down that time to 5 years, but to confer upon the company the exclusive right for 5 years which the municipal council had the right to grant under the above referred to section, 331.

Had clause 7 not been introduced into the agreement, there could have been no question of the time; and, if it was intended that the company's right to carry on its operations within the town should be limited to 5 years, it should have been so expressed.

Reading the whole agreement, I am unable to say that it limits the operations to 5 years, though it is quite clear that it limits the company's exclusive right to that time.

The learned Judge was of opinion that sec. 331 is not merely an exception to the general provisions of sec. 330, against the granting of a monopoly, but is far more radical. With great respect, I am unable to agree with that view. Nor do I agree with the proposition of counsel that the language of clause 8 of the agreement and the use of the words "term of said franchise" in clause 9 have such application to the general language of clause 1 as necessarily to limit the time for which the consent of the town was given.

App. Div.
1918

TEMIS-
KAMING
TELEPHONE
Co.

LIMITED
v.

TOWN OF
COBALT.

Kelly, J.

App. Div.
1918

TEMIS-
KAMING
TELEPHONE
Co.

LIMITED

v.
TOWN OF
COBALT.

Kelly, J.

My opinion is that, while the exclusive right given by clause 7 was limited to 5 years, the municipal council had authority to pass the by-law for giving the consent which the respondent assumed to give by clause 1 of the agreement, and that the time for which such consent was given was not, as contended by the respondent, limited to 5 years, the 5 years mentioned in clause 7 applying only to an exclusive right for that time.

The appeal should be allowed and the judgment below set aside, both with costs; and judgment should be entered for the plaintiff (with costs) in accordance with the above findings and for \$300 damages; if either party be dissatisfied with this amount, the matter may be spoken to.

RIDDELL, J.:—This is an appeal by the plaintiff company from the judgment of Mr. Justice Middleton, 42 O.L.R. 385, 43 D.L.R. 724.

The learned trial Judge has set out all the material facts (with one exception, shortly to be mentioned).

It seems to have been urged at the trial that the company had some rights on the streets before and dehors the agreement with the town; but that was not urged before us, the appellant company avowedly resting its whole case on the agreement.

In my view, the company could not successfully contend for any such rights, in view of the provisions of its charter.

The rights then of the parties are admitted to depend on the agreement.

On the argument there was much discussion as to the power of the town to make the agreement: in my view, that need not be decided. If the agreement was *ultra vires*, the plaintiff company has no rights; it must rely on the agreement or it is out of Court. Admitting the validity of the agreement, it remains to interpret it—and for this purpose I think clause 9 should be borne in mind:—

“9. That the said company shall not during the term of said franchise charge more than \$40 per year for a business wall telephone and \$20 per year for a private wall telephone in said municipality.”

The “said franchise” can refer only to the right given by clause 1 to the plaintiff company, of “exercising its powers by constructing, maintaining, and operating its lines of telephone,”

etc.; that this franchise has a "term" is expressly stated by clause 9. "Term" is not properly applicable to anything in perpetuity, but the word imports termination at some time, primarily of course after a fixed number of years, but not improperly on the occurrence of death of the termor.

Even without this clause, I should have come to the same conclusion as my brother Middleton; but this clause seems to me to be conclusive.

I would dismiss the appeal with costs.

LATCHFORD, J., agreed with RIDDELL, J.

Appeal allowed (RIDDELL and LATCHFORD, JJ., dissenting.)

[APPELLATE DIVISION.]

RE TORONTO R.W. CO. AND CITY OF TORONTO.

App. Div.
1918
—
TEMIS-
KAMING
TELEPHONE
Co.
LIMITED
v. THE
TOWN OF
COBALT.
—
Riddell, J.

1918
—
Dec. 20.

Street Railway—Penalty for Non-compliance with Order of Ontario Railway and Municipal Board—Confirmation of Order by 7 Geo. V. ch. 92, sec. 17—Failure to Furnish and Operate Additional Cars within Time Fixed by Order—Power to Impose Penalty Given by sec. 260a of Ontario Railway Act (8 Geo. V. ch. 30, sec. 4)—Failure to Excuse Non-compliance—Finding of Board—Appeal—Neglect to Apply to Rescind Order or Extend Time—Ontario Railway and Municipal Board Act, secs. 25, 42—Enforcing Compliance with Previous Order—Lapse of Time Fixed by Previous Order—Validity of Order of Board—Presumption of Validity of Appointment of de Facto Members—Appointment by Lieutenant-Governor or Governor-General—British North America Act, sec. 96—Status of de Facto Member—Right to Question in Collateral Proceeding—Proceeding by Quo Warranto Information—Jurisdiction—"Court"—"Superior Court"—Powers and Duties of Board, Administrative and Judicial—Statutory Provisions.

An order was made by the Ontario Railway and Municipal Board on the 27th February, 1917, and confirmed by 7 Geo. V. ch. 92, sec. 17, requiring the Toronto Railway Company to place in operation upon its system, not later than the 1st January, 1918, 100 additional cars. On the 19th April, 1918, a further order was made by the Board, which, after reciting that the former order had not been complied with, and that, in the opinion of the Board, there had not been proper excuse or justification for such non-compliance, required the company to pay to the city corporation a sum of money as a penalty. This order was made under the authority of sec. 260a of the Ontario Railway Act, as enacted in 1918 by an amending Act, 8 Geo. V. ch. 30, sec. 4. The company admitted that it had not complied with the order, but asserted that it had made all possible efforts to do so—that compliance, owing to war and other conditions, was impossible. The company did not apply to the Board, under sec. 25 of the Ontario Railway and Municipal Board Act, to rescind or vary the order of 1917, nor, under sec. 42, to extend the time for compliance with the order:—

App. Div.
1918
—
RE
TORONTO
R.W. Co.
AND
CITY OF
TORONTO.

Held, upon appeal from the order of April, 1918, that, as long as the order of February, 1917, stood, what the company set up as an answer to the application to impose the penalty which the Board was empowered to impose, was no answer.

Semble, that the conclusion of the Board that there had not been proper excuse or justification for non-compliance with the first order, was not erroneous.

And held, that the substance of the thing to be done was the putting in service of the additional cars, and an order made for the purpose of compelling that to be done was such an order as it was contemplated might be made, i.e., for the purpose of enforcing compliance with the previous order, although the time limited for putting the cars in service had elapsed.

It was contended that the order of the Board had no validity, because the Board was a "Superior Court" within the meaning of sec. 96 of the British North America Act, and its members, not having been appointed by the Governor-General, had no jurisdiction to exercise the powers conferred upon the Board by the Act by which it was created:—

Held, that the presumption was that *de facto* members of the Board were validly appointed, and there was nothing to shew that they were not appointed by the Governor-General.

(2) The status of a *de facto* Judge, having at least a colourable title to the office, is not open to attack in a collateral proceeding, and his acts are valid; the proper proceeding to question his right to the office is by *quo warranto* information.

Review of the authorities.

Cases such as *Dimes v. Grand Junction Canal Co.* (1852), 17 Jur. 73, where the right of a Judge said to be disqualified from interest to sit in a particular case has been questioned upon appeal, distinguished.

(3) The body which was created under the authority of the Ontario Railway and Municipal Board Act is "in pith and substance" not a Court, but an administrative body, having, as incidental to the performance of its administrative functions and the exercise of its administrative powers, jurisdiction to construe contracts with respect to undertakings of a public character, subject to the jurisdiction of the Legislature of Ontario.

Re Town of Sandwich and Sandwich Windsor and Amherstburg R.W. Co. (1910), 2 O.W.N. 93, 98, followed.

Winnipeg Electric R. Co. v. City of Winnipeg (1916), 30 D.L.R. 159, distinguished.

The duties imposed and the powers conferred upon the Board by the Ontario Railway and Municipal Board Act, the Ontario Railway Act, and other statutes, considered.

The Board has been recognised by the Parliament of Canada by 1 & 2 Geo. V. ch. 22, sec. 5.

(4) If the Board is a Court, it is not a "Superior Court" within the meaning of sec. 96 of the British North America Act.

Sections 5 (1) and (4), 15 (1), 31, 33, 34, 38, 44, 48 (b), and 54, considered. These provisions indicated that their purpose was to make it clear that the Board, if it should be held to be a Court, was not a Superior Court but an inferior Court, not subject however to have its proceedings reviewed in the manner in which those of an inferior Court may be reviewed.

(5) According to the rule laid down in *Severn v. The Queen* (1878), 2 Can. S.C.R. 70, 103, the Legislature in the Ontario Railway and Municipal Board Act, 1906, must be taken to have constituted a tribunal, the members of which should be appointed under its authority as provided by sec. 4 (2), and not to have created a Superior Court and usurped an authority which it did not possess, but which was vested in the Governor-General.

Per FERGUSON, J.A.:—The Board is not a Superior Court, for the reason, among other reasons, that it has no right or power to control, regulate, restrain, or review, the acts and proceedings of some other Court.

An appeal by the Toronto Railway Company from an order of the Ontario Railway and Municipal Board, dated the 19th April,

1918, made under the authority of sec. 260a of the Ontario Railway Act, added by 8 Geo. V. ch. 30, sec. 4, requiring the appellant company to pay forthwith to the Corporation of the City of Toronto, the respondent, a penalty of \$1,000 per day from the 27th March, 1918, to the 19th April, 1918, being \$24,000 in all, for non-compliance, without proper excuse or justification, with an order of the Board, dated the 27th February, 1917, which required the appellant company to furnish and place in operation 100 additional cars not later than the 1st January, 1918, and 100 more not later than the 1st January, 1919.

November 7 and December 2 and 3. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

J. W. Bain, K.C., and *Christopher C. Robinson*, for the appellant company, argued that the company, admitting their failure to comply with the order of the 27th February, 1917, should be relieved from the penalty imposed by the Ontario Railway and Municipal Board, on the ground that, acting with the utmost good faith, it had used its best efforts to obey the directions of the Board, but had been unable to do so, owing to the unfavourable conditions produced by the war and other causes. They also argued that the Board is a Superior Court; and, under sec. 96 of the British North America Act, the members should be appointed by the Dominion. They referred to *Cannon Brewery Co. v. Central Control Board (Liquor Traffic)*, [1918] 2 Ch. 101; *Winnipeg Electric R. Co. v. City of Winnipeg* (1916), 30 D.L.R. 159. [MEREDITH, C.J.O., referred to Lefroy's Legislative Power in Canada, pp. 136 *et seq.*, where is found Sir John Thompson's report on the Quebec District Magistrates' Act, *op. cit.*, pp. 141-174.] On the meaning of "Court," reference was made to Stroud's Judicial Dictionary, 2nd ed., p. 424; *Dawkins v. Rokeby* (1873), L.R. 8 Q.B. 255; *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, [1892] 1 Q.B. 431, *per Fry*, L.J., at p. 446; *Boulter v. Kent Justices*, [1897] A.C. 556. *Huish v. Liverpool Justices*, [1914] 1 K.B. 109, 116, was cited as to the distinction between judicial and administrative functions, and it was argued that, in the orders now in question, the Board was assuming to exercise judicial functions. [MEREDITH, C.J.O., stated that, in

App. Div.
1918

RE
TORONTO
R.W. Co.
AND
CITY OF
TORONTO.

App. Div.
1918

RE
TORONTO
R.W. Co.
AND
CITY OF
TORONTO.

his view, the orders were clearly not judicial, but administrative.] The following cases were also referred to: *Mayor etc. of London v. Cox* (1867), L.R. 2 H.L. 239, 260, 261; *Beamish v. Kaulbach* (1879), 3 Can. S.C.R. 704; *Ex p. Fernandez* (1861), 10 C.B.N.S. 3; *Burk v. Tunstall* (1890), 2 B.C.R. 12; *Colonial Investment and Loan Co. v. Grady* (1915), 24 D.L.R. 176.

J. R. Cartwright, K.C., for the Attorney-General for Ontario, referred to *Regina v. Bush* (1888), 15 O.R. 398, and to *Re Munro and Downey* (1909), 19 O.L.R. 249. He also referred to the extraordinary result which would follow if the contention of the appellant company should prevail, as it would involve the invalidating of many important statutes.

Irving S. Fairty and *C. M. Colquhoun*, for the respondent city corporation, contended that the judgment of the Board was right, and should be affirmed. The action of the appellant company throughout had been marked by great obstruction and lack of good faith. As to the contention that the Board is a Court, they referred to *Re Town of Sandwich and Sandwich Windsor and Amherstburg R.W. Co.* (1910), 2 O.W.N. 93. They also referred to *City of Kingston v. Kingston Electric R.W. Co.* (1898), 25 A.R. 462; the judgment of *Perdue, J.A.*, in the *Winnipeg* case, 30 D.L.R. at p. 174 *et seq.*; *Young v. Woodcock* (1847), 5 N.B.R. 554; *In re Small Debts Act* (1896), 5 B.C.R. 246; *Levy v. Moylan* (1850), 10 C.B. 189; *Town of Waterloo v. City of Berlin* (1913), 28 O.L.R. 206, 7 D.L.R. 241, 12 D.L.R. 390; *Ganong v. Bayley* (1877), 17 N.B.R. 324; *Polson Iron Works v. Munns* (1915), 24 D.L.R. 18.

Robinson, in reply, referred to *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, 364.

December 20. MEREDITH, C.J.O.:—This is an appeal by the Toronto Railway Company from an order of the Ontario Railway and Municipal Board, dated the 19th April, 1918.

The order was made under the authority of the Act 8 Geo. V. ch. 30, sec. 4, adding to the Ontario Railway Act a new section, 260a, which provides that:—

“The Board, for the purpose of enforcing compliance with any order heretofore or hereafter made by it, requiring any railway company, operating a railway or street railway in whole or in part upon or along a highway under an agreement with a municipal

corporation, to furnish additional cars or equipment for its service, in addition to any other powers possessed by it, may order such company to pay to the corporation of the municipality in which the company so operates, a penalty not exceeding \$1,000 a day for non-compliance with any such order."

The order appealed from recites that an order of the Board, dated the 27th February, 1917, which required the appellant to furnish additional cars for its service, had not been complied with, and that "in the opinion of the Board there had not been proper excuse or justification for such non-compliance," and that it appeared that "for the purpose of enforcing compliance with the said order the Board should order the" appellant "to pay to the" respondent "a penalty for non-compliance with the said order," and it is ordered that the appellant "do forthwith pay to the applicant" (i.e., the respondent) "a penalty of \$1,000 per day from the 27th day of March, 1918, to the date hereof, both days inclusive, being the sum of \$24,000 in all."

The order of the 27th day of February, 1917, required the appellant "to place in operation on its system 100 additional double truck motor cars not later than the 1st day of January, 1918, and a further additional 100 double truck motor cars not later than the 1st day of January, 1919."

The order also provides for the appellant, on request, informing the respondent from time to time "in and about the performance" of the order, and for the respondent's engineer or his authorised representative from time to time having access to the appellant's premises, works, and records, in order that the respondent may verify the information so given and may be fully advised as to the progress and efforts made in carrying out the order. All this for the purpose, as the order states, of assuring the faithful and punctual performance of the order.

The respondent does not admit that the only authority to make this order was the legislation to which I have referred, but contends that the Board had authority to make it under the general powers conferred on the Board by sec. 260 of the Ontario Railway Act.

That the appellant did not comply with the directions of the order of the 27th February, 1917, is admitted, but it is contended that it, in good faith, made all possible efforts to comply with those directions, but was unable to comply, owing to it being impossible,

App. Div.
1918

RE
TORONTO
R.W. Co.
AND
CITY OF
TORONTO.

Meredith, C.J.O.

App. Div.
1918

RE
TORONTO
R.W. Co.
AND
CITY OF
TORONTO.

Meredith, C.J.O.

because of war and other conditions, to get the cars built for it, or to obtain the steel and the labour necessary for the building of them, if that work had been undertaken by the appellant itself.

It was, no doubt, shewn that these difficulties existed to some extent and were sufficient to have rendered the putting in service of 100 cars by the 1st day of January, 1918, difficult; but it is undoubted also that the appellant took no proper steps to obtain contracts for the supply of the cars to be delivered at the earliest date at which car-builders would have been willing to have delivered them; and it is clear, I think, from the statement of the appellant's general manager, that, if it had been practicable to have obtained the cars in time, the appellant would not have bought them, because of the very large sum that it would be necessary to expend in the purchase of them.

The position of matters to-day—as to the putting in service of the first 100 cars—is precisely the same as it was when the order of the 27th February, 1917, was made; and, in my opinion, the appellant has not done all that it could and should have done to ensure the putting in service of these cars at the earliest practicable moment.

The obviously proper course for the appellant to have taken was, when the difficulty of getting the cars in time presented itself, to have made an application to the Board to exercise the power it had under sec. 25 of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, to rescind or vary the order it had made; but no such application was made, nor was an application made under sec. 42, which provides that:—

“When any work, act, matter or thing is, by any regulation, order or decision of the Board, required to be done, performed or completed within a specified time the Board may, if the circumstances of the case, in its opinion, so require, upon notice and hearing, or in its discretion upon *ex parte* application, extend the time so specified.”

Why an application was not made under one or other of these sections, it is difficult to understand, but it is possible that it was because it was feared that the application would not be successful, and if unsuccessful there would have been no appeal from the Board's decision. Nor was it made after the order had been confirmed by 7 Geo. V. ch. 92, sec. 17, although by that section

it was provided that nothing in it should interfere with the powers of the Board under sec. 25.

I am of opinion that, as long as the order of the 27th February, 1917, stands, what the appellant sets up as an answer to the application of the respondent to impose the penalty which the Board is empowered to impose, is no answer.

I am also of opinion that, if that question were open, in the circumstances and upon the material before the Board, this Court cannot say that the conclusion of the Board, "that there had not been proper excuse or justification for non-compliance with the order of the Board," was erroneous and should be reversed.

It was suggested upon the argument that, as the power conferred upon the Board to impose a penalty was in terms given for the purpose of enforcing compliance with any order of the Board "heretofore or hereafter made," and as the time for compliance with the order of the 27th February, 1917, as to the first 100 cars, had expired, the order in appeal could not be and was not such an order.

Though reading the provision literally, and having regard only to its form, this objection might appear to be well-founded, the substance of the thing to be done was the putting in service of the additional cars, and an order made for the purpose of compelling that to be done is, in my opinion, such an order as it was contemplated might be made, although the time limited for putting the cars in service had elapsed.

The purpose of the legislation was in part at least to make effective the order of the 27th February, 1917, and to enable that to be done by imposing a penalty for non-compliance with it.

It was contended by counsel for the appellant, and an able and elaborate argument in support of the contention was presented by Mr. Robinson, that the order of the Board has no validity; that the Board is a "Superior Court" within the meaning of sec. 96 of the British North America Act, and its members, not having been appointed by the Governor-General, as he contended, had no jurisdiction to exercise the powers conferred upon the Board by the Act by which it was created.

The presumption undoubtedly is that *de facto* members of the Board were validly appointed, and it might be a sufficient answer to the contention to say that there is nothing to shew that they were not appointed by the Governor-General.

App. Div.
1918

RE
TORONTO
R.W. Co.
AND
CITY OF
TORONTO.

Meredith, C.J.O

App. Div.
1918

RE
TORONTO
R.W. Co.
AND
CITY OF
TORONTO.

Meredith, C.J.O

There is, however, an insuperable difficulty in the way of the appellant's success on this branch of the case.

That it is not open to attack, in a collateral proceeding, the status of a *de facto* Judge, having at least a colourable title to the office, and that his acts are valid, is clear, I think, on principle and on authority, and it is also clear that the proper proceeding to question his right to the office is by *quo warranto* information.

I have been unable to find any reported English case in which that procedure has been taken in respect to a Judge of a Superior Court, though it has been taken, or recognised as proper to be taken, in the case of a Judge of a County Court: *Regina v. Parham* (1849), 13 Q.B. 858; in the case of a recorder: *Rex v. Mayor of Colchester* (1788), 2 T.R. 259; *Rex v. Sandys* (1733), 2 Barn. (K.B.) 301; and *Rex v. Marshall* (1817), 2 Chitty 370; and in the case of a coroner: *Regina v. Grimshaw* (1847), 10 Q.B. 747; *Regina v. Taylor* (1840), 11 A. & E. 949; *Rex v. Sayer* (1772), 5 T.R. 376 (note); and *Regina v. Diplock* (1868-9), 10 B. & S. 174, L.R. 4 Q.B. 549; see also *Askew v. Manning* (1876), 38 U.C.R. 345, 354, *et seq.*, and *Chaplin v. Public School Board of Town of Woodstock* (1889), 16 O.R. 728, and the cases there cited.

The reason for this dearth of authority as to a Judge of a Superior Court is, no doubt, that the question could hardly arise in Great Britain. That reason does not, however, exist in the case of Canada and of the United States of America, because the former is divided into Provinces and the latter into States having separate constitutions, and their powers are limited by them, as indeed are the powers conferred on the Parliament of Canada by the British North America Act, and those conferred upon Congress by the Constitution of the United States. The rule is founded on good sense, for it would be an intolerable state of things if, in the case of such a body as the Ontario Railway and Municipal Board, it should be held that the Board is a Superior Court, and the result would be that all of its acts were to be treated as invalid because the members of the Board were appointed by the Lieutenant-Governor in Council and not by the Governor-General.

In *The People v. Bangs* (1860), 24 Ill. 184, which was the case of an information in the nature of a *quo warranto* to try the right of Mark Bangs, who had been elected to the office of Judge of the twenty-third judicial circuit of the State of Illinois, to hold that

office, it was held by the Supreme Court that the Act of the State Legislature by virtue of which Bangs claimed to hold the office was unconstitutional.

In delivering the judgment of the Court, the Chief Justice, referring to the Act, said (p. 187):—

“It gave Judge Bangs colour of office, no doubt, and, acting as he did under colour of office, his acts were as valid, of course, as if the law had been constitutional.”

In *Campbell v. The Commonwealth* (1880), 96 Penn. St. 344, the question was raised as to the validity of a conviction for arson made by a Court consisting of the President Judge of the Courts of Fayette county and two persons who claimed to be Associate Judges, but whose election was alleged to be invalid on the ground that the people who elected them had no power to elect Associate Judges in that county.

It was held by the Supreme Court of the State that these two persons were Judges *de facto*, and as against all parties but the Commonwealth they were Judges *de jure*, and, having at least a colourable title to those offices, their title to them could not be questioned in any other form than by *quo warranto* at the suit of the Commonwealth.

In that case the Court followed a decision of the Federal District Court of Oregon in *In re Ah Lee* (1880), 5 Fed. Repr. 899, in which it was held that “a person in office by colour of right is an officer *de facto*, and his acts as such are valid and binding as to third persons; and an unconstitutional act is sufficient to give such colour to an appointment to office thereunder.”

The question there was as to the constitutionality of an Act of the State Legislature, under the authority of which the Judges of the Court, before whom a prisoner had been tried, were appointed, and the question arose on his application for a writ of *habeas corpus*.

In *Cæsar Griffin's Case* (1869), Chase's Decisions (Johnson's Rep.) 364, the same conclusion was reached by Chief Justice Chase, sitting in the Federal Circuit Court for the District of Virginia.

Burt v. Winona and St. Peter R.R. Co. (1884), 31 Minn. 472, is a decision to the same effect, by the Supreme Court of Minnesota.

The same ruling was made by the Supreme Court of Errors of

App. Div.
1918

RE
TORONTO
R.W. Co.
AND
CITY OF
TORONTO.

Meredith, C.J.

App. Div.
1918

RE
TORONTO
R.W. Co.
AND
CITY OF
TORONTO.

Meredith, C.J.O.

the State of Connecticut in *Brown v. O'Connell* (1870), 36 Conn. 432, and it was held by the Court that "to constitute an officer *de facto* it is not necessary that he have colour of appointment from some power having actual authority to make the appointment, but it is sufficient that he has had appointment from some power having colour of authority to make it."

The question in that case arose in an action on a recognizance entered into by the defendant before the person acting as Judge of a Police Court, the validity of whose appointment was attacked.

In stating his opinion, Butler, J., said (p. 449):—

"It is easy to suppose cases where an officer may be appointed by a body who suppose they have a right to appoint him, when in law they have not, and yet the officer will be such *de facto* and his acts cannot be collaterally impeached."

This case is referred to in Brice on *Ultra Vires*, 3rd ed., p. 614, as authority for the proposition that "a judicial officer appointed by the common council of a city in pursuance of an Act of the Legislature afterwards declared unconstitutional is an officer *de facto*, and a recognizance entered into before him is valid."

There are numerous other cases in the Courts of the United States of America to the same effect as those which I have mentioned. The rule to be deduced from the cases in the United States is stated in 23 Cyc. 621, as follows: "The right of a *de facto* Judge to hold his office is not open to question, nor are his acts subject to attack in a collateral proceeding; these being matters which can only be inquired into in a proceeding to which he is a party. . . . Nor can his title be determined in an action tried before him, nor in *certiorari* proceedings to review a conviction had before him, nor on an appeal by a person who has been tried and convicted before him;" and cases are referred to which support each of the propositions stated.

I refer also to the same volume, under the heading "*De Facto* Judges," pp. 618, 619, and 620, and also to what is said on pp. 512 and 513, under sub-head C. of division 5, under the heading, "Proceedings to Test Right to Office."

Where a Judge is disqualified by interest, the rule is different, and his right to sit may be questioned on an appeal from his decision, as was done in *Dimes v. Grand Junction Canal Co.* (1852), 17 Jur. 73, but that class of cases is quite distinguishable.

In them there is no ground upon which the right to sit can be questioned by *quo warranto* proceedings, the Judge rightly occupies the office, and such proceedings would be wholly inapplicable; and, besides, in the other class of cases, if the act of the *de facto* officer could not be supported on the ground upon which the decisions in the cases I have referred to were based, his acts would be void, and no consent or acquiescence could give to them validity; while in the other case—the disqualification of a Judge on the ground of interest—his acts are only voidable, and therefore cannot be attacked where there was consent or acquiescence.

It is a further answer to this branch of the appellant's case, that it has been decided by an authority binding upon us that the Board is "not a Court, but an administrative body having, in connection with its primary duty, power to construe the agreements which it is called on to enforce, but no general power such as the Superior Courts possess of adjudicating upon questions of construction in the abstract:" *Re Town of Sandwich and Sandwich Windsor and Amherstburg R.W. Co.*, 2 O.W.N. 93, 98 (C.A.)

That statement is one of the reasons upon which the judgment of the Court was based, and it is therefore, as I have said, an authority binding on us.

I do not mean that I have any doubt as to the correctness of this ruling, for an independent examination has led me to the same conclusion; and, in my opinion, the body which was created under the authority of the Ontario Railway and Municipal Board Act is, to use the expressive language of Lord Watson, "in pith and substance" not a Court, but an administrative body, having, as incidental to the performance of its administrative functions and the exercise of its administrative powers, jurisdiction to construe contracts.

I agree with the contention of Mr. Robinson that a body which is in "pith and substance" a Court is none the less a Court because it is not called by that name.

It is not without importance, however, that the body for the appointment of which the Act gave authority to the Lieutenant-Governor in Council is called "a Commission," and that it is not, in terms at all events, created a Court, but is given "all the powers of a Court of record." Although these words are general, they do not extend beyond giving to the Board those powers in respect to matters with which by the Act the Board is authorised to deal.

App. Div.
1918

RE
TORONTO
R.W. Co.
AND
CITY OF
TORONTO.

Meredith, C.J.O.

App. Div.
1918

RE
TORONTO
R.W. Co.
AND
CITY OF
TORONTO.

Meredith, C.J.O.

The body which was held by the Court of Appeal of Manitoba in *Winnipeg Electric R. Co. v. City of Winnipeg*, 30 D.L.R. 159, to be a Court, was by the Act declared to be a Court of record, and that difference between the Act and the Act in question in this case, as well as other differences between them, was pointed out by the present Chief Justice of that Court (pp. 181, 182).

The Ontario Act R.S.O. 1914, ch. 186, is confined in its operation to railways, street railways, telegraph or telephone systems, and public utilities (sec. 21 (1)). A public utility is defined to mean and include "any waterworks, gasworks, electric heat, light and power works, and telegraph or telephone lines or any works supplying the general public with necessities or conveniences" (sec. 3 (a)).

These things must be taken to mean such of them as are under the legislative authority of the Provincial Legislature.

Section 21 is designed to provide and does provide only for the enforcement of the obligations of these bodies to the public under the Act or under any other general or special Act, or under "any regulation, order or direction made thereunder," or under any agreement entered into by them, or under any stipulation or condition in a municipal by-law accepted or acted on by them, or in respect of the tolls to be charged as prescribed by lawful authority, and to deal with complaints that the tolls charged are in excess of such tolls, or are otherwise unlawful, unfair, or unjust.

Section 60 authorises the Board, when requested so to do, to act as arbitrator where there is a dispute between a railway, street railway, or public utility company and its employees; and sec. 61 directs the Board, when a strike or lock-out of the employees of any such company occurs, to endeavour by mediation to effect an amicable settlement of the controversy; and other powers are conferred upon the Board to investigate and make recommendations where the Board is of opinion that as a consequence of the strike or lock-out the general public is likely to suffer injury or inconvenience with respect to fuel, light, or power, the means of communication or transportation, or in any other respect, and the parties to the strike or lock-out will not consent to submit the matter in controversy to the Board.

Other powers are conferred upon the Board by the Ontario Railway Act, 6 Edw. VII. ch. 30, in respect of the gauge of

the railway (sec. 75); trains, cars, and appliances (secs. 76 to 82); frogs and packing (sec. 83); drainage (secs. 84 and 85); farm-crossings (sec. 86); fences, gates, and cattle-guards (sec. 87); bridges, tunnels, and other structures (secs. 88 and 89); highway-crossings (secs. 90 to 97); crossings and junctions (sec. 98); mines and minerals (secs. 99 to 104); operation of the railway (secs. 118 (1), 122 (2), 124 (3)); crossing draw or swing bridges (sec. 122); sleeping and parlour cars (sec. 127); stations (sec. 128); as to approval of by-laws passed by a company (sec. 153); as to the inspection of railways (secs. 162 to 167); as to by-laws fixing tolls (secs. 169 and 170); discriminating tolls (secs. 173, 175, and 176); guard-wires (sec. 194); amending or quashing by-laws authorising the construction of a railway or street railway on a highway (sec. 198); deviations from highways to right of way owned by the company (sec. 199); subsidised railways and hours of labour on them (sec. 225); duration of street railway franchises (sec. 202); duration of privileges to operate electric railways (sec. 208); fenders and brakes (secs. 209 to 211); lavatories (secs. 213 and 214); radial lines (secs. 218 and 220); examination of motormen (sec. 221); hours of labour (sec. 227); returns by companies (secs. 228 to 236); investigation of accidents (sec. 237); the transmission of power on the railway's right of way to works and plant of municipal corporation (sec. 256).

Additional powers in respect of railways have been conferred upon the Board by subsequent legislation. Among these are powers as to equipment and service, conferred by what is now sec. 105 of the Ontario Railway Act (R.S.O. 1914, ch. 185), and was originally enacted by 10 Edw. VII. ch. 83, sec. 2; as to drainage, first enacted by 3 & 4 Geo. V. ch. 36, sec. 109, and now part of sec. 109 of the Revised Statute; as to canals, ditches, wires, etc., first enacted by 3 & 4 Geo. V. ch. 36, sec. 111, and now sec. 111 of the Revised Statute; as to express tolls, first enacted by 3 & 4 Geo. V. ch. 36, sec. 178 to sec. 185, and now sections of the same numbers in the Revised Statute; as to freight classification and tariffs, first enacted by 3 & 4 Geo. V. ch. 36, secs. 188 to 209, and now sections of the same numbers of the Revised Statute; as to traffic facilities by contiguous lines, first enacted by 2 Geo. V. ch. 35, secs. 1 to 8, and now sec. 212 of the Revised Statute; as to ordering repairs or improvements or additions to subsidised railways, 3 & 4 Geo. V.

App. Div.
1918
—
RE
TORONTO
R.W. Co.
AND
CITY OF
TORONTO.

Meredith, C.J.O.

App. Div.
1918

RE
TORONTO
R.W. Co.
AND
CITY OF
TORONTO.

Meredith, C.J.O.

ch. 36, sec. 269, and now sec 269 of the Revised Statute; as to "pay as you enter" system, first enacted by 1 Geo. V. ch. 53, sec. 214*a*, and now sec. 256 of the Revised Statute. There have been various minor amendments of some of these sections, but it is not necessary for my purpose to enumerate them.

The Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31, contained a provision (sec. 63(1)) authorising the Board to make orders for the enforcement of municipal agreements under which a railway is operated on a highway. The section no longer appears in that Act, but is sec. 260 of R.S.O. 1914, ch. 185 (the Railway Act).

Powers as to municipal street railways were conferred upon the Lieutenant-Governor in Council by 3 Edw. VII. ch. 19, sec. 569 (1) to (3), and upon the Board by 10 Edw. VII. ch. 81, secs. 2 and 4, and the provisions of these sections form sec. 232 of the Revised Statute.

Powers as to the revision of assessments and powers as to certain municipal matters were conferred upon the Board by the Ontario Railway and Municipal Board Act, 1906. In the revision of the statutes these provisions were transferred to other Acts, and certain powers as to local improvements have also been given to the Board by subsequent legislation.

All of these multifarious duties and powers are of an administrative character, and the only authority which is conferred upon the Board of a strictly judicial character is that of construing contracts for the purpose of exercising the administrative powers which the Board possesses, and that moreover only with respect to undertakings of a public character, subject to the jurisdiction of the Legislature of Ontario, and to contracts by municipal bodies with the undertaker or those having the conduct or management of them.

It is not without significance, though not a conclusive circumstance, that the Provincial Railway Board has been recognised by the Parliament of Canada by 1 & 2 Geo. V. ch. 22, sec. 5, and that reciprocal arrangements for the constitution of a joint Board composed of members of the Dominion Railway Board and of the Provincial Board to determine questions arising where the lines of a Provincial railway are intersected by those of a Dominion railway are embodied in that legislation and in corresponding Provincial legislation (R.S.O. 1914, ch. 185, sec. 131).

In the recent case of *Copartnership Farms v. Harvey-Smith*, [1918] 2 K.B. 405, *Dawkins v. Rokeby*, L.R. 8 Q.B. 255, and the other cases of that class cited by Mr. Robinson, are reviewed by Sankey, J., and the principle deduced from them was that "where a tribunal is a Court of justice, or a body acting in a manner similar to that in which a Court of justice acts, any statement made by a member thereof is absolutely privileged and no action can be brought thereon."

App. Div.
1918

RE
TORONTO
R.W. Co.
AND
CITY OF
TORONTO.

Meredith, C.J.O

In the Scotch case of *Slack v. Barr* (1918), 82 J.P. 91, Lord Anderson, answering the argument that had been presented that this rule applies only to statements made . . . in Courts of justice, said:—

"As the rule of law is based on considerations of public policy, I am unable to see why these should not apply to all occasions on which evidence is given for public purposes before any public body, whether that body is purely judicial, or quasi-judicial, or exists merely for administrative purposes. If this view be sound, it would make the general rule applicable to such bodies as royal and parliamentary commissions, licensing courts, county and parish councils, and similar administrative bodies."

That there may be a judicial tribunal which is not a Court is shewn by the case of *Barratt v. Kearns*, [1905] 1 K.B. 504, in which it was held that a Commission appointed under statutory authority by the Bishop of Winchester, to inquire into the inadequate performance of the ecclesiastical duties of a benefice, was a judicial tribunal. A tribunal so constituted, though judicial, would not be a Court of justice, at all events in the sense in which the word "Courts" is used in sec. 96 of the British North America Act.

My conclusion is that the Board, although it has, for some purposes, and those but a small part of its powers and duties, judicial functions to perform, is not a Court.

If I am wrong in this, and the Board is a Court, I am of opinion that it is not a Superior Court within the meaning of sec. 96 of the British North America Act.

In the first place, it is not in terms declared to be a Court, but on the contrary is given the powers of a Court of record (R.S.O. 1914, ch. 186, sec. 5(4)); its members are to be appointed by the Lieutenant-Governor in Council (sec. 5(1)); their tenure of office is not during good behaviour; and there are a number of provisions

App. Div.
1918

RE
TORONTO
R.W. Co.
AND
CITY OF
TORONTO.

Meredith, C.J.O

which would be quite unnecessary if the Board were intended to be a Court, and others quite unnecessary if the Board were intended to be a Superior Court. Of the former class may be mentioned: the provision as to the use by the Board of the court-house and buildings for the administration of justice of the county or district in which the sittings of the Board or a member of it are held (sec. 15(1)); the provisions requiring sheriffs, deputy sheriffs, constables, and other peace officers to aid, assist, and obey the Board in the exercise of its jurisdiction whenever required to do so (sec. 31); the provision as to documents purporting to be signed by the Chairman and Secretary, or by either of them, being *prima facie* evidence (sec. 33), and analogous provisions in sec. 34; the provision that a certified copy of an order or decision of the Board may be filed in the office of the Clerk of Records and Writs, and that it shall thereupon become and be enforceable as a judgment or order of the Supreme Court to the same effect, a practice analogous to that for enforcing an award (sec. 38); the provision that an order of the Board need not shew on its face that any proceeding or notice was had or given, or any circumstances existed, necessary to give it jurisdiction to make the order (sec. 44); the provision that no order, decision, or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari*, or any other process in any Court, save as provided by the Act, i.e., by appeal to a Divisional Court (sec. 48, sub-sec. 8, cl. (b)); and the provision as to the payment of witness-fees (sec. 54).

It was argued by Mr. Robinson that these provisions were not inconsistent with the intention and effect of the Act being to create a Superior Court, but that they were embodied in the Act *ex majori cautela*, to prevent any question being raised as to the Board not being a Superior Court, or at all events that the effect of them is to make the Board a Superior Court, whatever may have been the intention of the Legislature in that regard.

If there had been but one or two of these provisions, the argument would find some support in what was said by Sankey, J., in *Copartnership Farms v. Harvey-Smith*, [1918] 2 K.B. at p. 412, but the number and character of the provisions to which I have referred lead me to the conclusion that the proper inference to be drawn from their presence in the Act is not that they were embodied

in it for the purpose for which it is contended that they were enacted, but that they indicate that the purpose was to make it clear that the Board, if it should be held to be a Court, was not a Superior Court but an inferior Court, not subject however to have its proceedings reviewed in the manner in which those of an inferior Court may be reviewed.

According to the rule which has been admittedly laid down, that in considering a question as to the constitutional validity of a provincial enactment, it is the duty of the Court "to make every possible presumption in favour of such legislative acts, and to endeavour to discover a construction of the British North America Act which will enable us to attribute an impeached statute to a due exercise of constitutional authority, before taking upon ourselves to declare that, in assuming to pass it, the Provincial Legislature usurped powers which did not legally belong to it" (*per* Strong, J., in *Severn v. The Queen* (1878), 2 Can. S.C.R. 70, 103), we ought, in my opinion, to hold that in the Ontario Railway and Municipal Board Act, 1906, the Legislature must be taken to have constituted a tribunal, the members of which should be appointed under its authority as provided by sec. 4(2), rather than that the Legislature created a Superior Court and usurped an authority which it did not possess, but which was vested in the Governor-General.

For all these reasons, and I base my opinion upon all of them, I would affirm the order appealed from and dismiss the appeal with costs.

MACLAREN, MAGEE, and HODGINS, JJ.A., agreed with MEREDITH, C.J.O.

FERGUSON, J.A.:—The question, whether a Court or other tribunal is or is not a *Superior* Court within the meaning of the British North America Act, cannot, I think, be answered by reference only to the powers the Court or tribunal possesses to hear and determine or enforce the rights of litigants, but also by reference to the power of the Court or judicial body to adjudicate upon the rights and powers of other Courts and to control their acts and proceedings.

App. Div.
1918
—
RE
TORONTO
R.W. Co.
AND
CITY OF
TORONTO.

Meredith, C.J.O.

App. Div.
1918

RE
TORONTO
R.W. Co.
AND
CITY OF
TORONTO.

Ferguson, J.A.

For, as I read the British North America Act, the designation *Superior* as applied to a Court, means a Court, other than County and District Courts, in which is vested the right and power to control, regulate, restrain, or review the acts and proceedings of some other Court.

It is not contended that any such powers are, by the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, conferred upon the Board, and therefore the Board is not, in the sense I have indicated, a Court superior to some other Court.

For these and the reasons given by my Lord the Chief Justice in his opinion, which I have read, I agree with him that the appeal should be dismissed with costs.

Appeal dismissed with costs.

1918

[APPELLATE DIVISION.]

Sept. 10.
Dec. 20.

TRUSTS AND GUARANTEE CO. LIMITED v. GRAND VALLEY R.W. CO.

1919
Feb. 10.

Railway—Bondholders—Mortgages—Sale of Railway by Receiver—Distribution of Fund Arising from Proceeds of Sale—Conflicting Claims—Priorities—Liens of Bondholders—Claim to Liens by Holders of Detached Coupons—Transfer of Coupons—Effect of—Purchase or Satisfaction—Preservation of Lien—Exchange of Bonds of First Issue for those of Second Issue—Agreement for Exchange Procured by Misrepresentation—Relief by Way of Rescission or Reinstatement—Case of each Holder Requiring Separate Proof—Operation of Mortgage upon Railway afterwards Acquired by Railway Company—Rental—Charge on Railway Lands—Discharge by Payment out of Fund—Costs.

On the 30th May, 1902, the defendant company made a mortgage to the plaintiff company as trustee to secure an issue of bonds to the amount of \$800,000 and interest. This mortgage covered the Grand Valley line between Brantford and Galt, and the railway "constructed or which may be hereafter constructed (under the powers conferred) and all charters, franchises, privileges, and immunities now owned or possessed by it or to be hereafter acquired by it from any town or municipality or county or from any source whatever," and also included "all property whatever which may be hereafter acquired by it." The bonds issued in pursuance of this mortgage amounted to \$450,000. On the 1st July, 1902, the Brantford Street Railway Company mortgaged its undertaking to a trustee to secure bonds which were issued to the amount of \$125,000 and interest. On the 27th August, 1907, the defendant company made a second mortgage to the plaintiff company as trustee to secure bonds to the amount of \$4,000,000; bonds to the amount of \$1,774,500 (and interest) were issued. This mortgage covered the railway between Brantford and Galt, also the Brantford Street Railway, which had been acquired by the defendant company, and the Thames Valley Railway. Under the two mortgages to the plaintiff company, the receiver appointed in this action sold to the Corporation of the City of

Brantford the railway from Brantford to Galt and the Brantford Street Railway. The amount of cash realised from the sale was paid into Court, and, there being conflicting claims to the money, an issue was directed to be tried for the purpose of determining the rights and priorities of the claimants. The chief matter in dispute arose out of the claims of holders of interest coupons, clipped from the bonds issued in 1902 by the defendant company and the Brantford Street Railway Company respectively, secured by the two mortgages made in that year. Both principal and interest were secured by the mortgages. The coupons were in the usual form, and the title to the money secured by them passed by delivery of the coupons. The question was, whether the transactions under which the coupons were acquired by the claimants were transactions of purchase or of payment and satisfaction:—

Held (affirming the judgment of FALCONBRIDGE, C.J.K.B., who tried the issue), that the effect of the transactions was, that none of the coupons were sold or transferred in such a way as to preserve their lien or the right to rank with the outstanding bonds.

A holder of detached coupons may sue on them without being at the same time the holder of the bond.

McKenzie v. Montreal and Ottawa R.W. Co. (1878), 29 U.C.C.P. 333, approved. The coupon does not when detached lose the benefit of the mortgage lien.

The real test whether there was a payment in satisfaction or by way of purchase, lies in the knowledge and intention of both parties to that payment—which knowledge may be inferred from the circumstances; and, in case of doubt, the scale will be turned against the idea of purchase either by the want of proof of mutual intent or by the fact that there is not enough in the security to pay the principal of the debt and the coupons as well, so that a purchase would be prejudicial to the bondholder.

It is the setting up of the lien that necessitates the strict proof of knowledge or acquiescence in those bondholders who presented their coupons and received their money under the impression that they were being satisfied.

There was an absence of satisfactory proof of the independent origin of the transactions which were set up as purchases. The payments were made casually and by those having controlling positions in the companies affected.

Review of the American authorities.

Held, also, that the holders of bonds of the 1902 issue who exchanged them for bonds of the 1907 issue, and who claimed a return of their 1902 bonds and the cancellation of the agreement for exchange, upon the ground of a misrepresentation proved at the trial of the issue, were not, in this proceeding, entitled to relief *en masse*. Each bondholder who signed the agreement and exchanged his bonds must get relief because he was personally misled—he could not take advantage of the wrong done to another.

Held, also, that, although power to acquire the Brantford Street Railway was not possessed by the defendant company until 1906, the mortgage of the 30th May, 1902, was wide enough to include property afterwards acquired; and that mortgage ranked now in priority to that of 1907 upon the Brantford Street Railway as well as upon the railway from Brantford to Galt.

Collyer v. Isaacs (1881), 19 Ch. D. 342, 351, and *Holroyd v. Marshall* (1862), 10 H.L.C. 191, 211, followed.

One S. claimed the rental for a piece of property not taken over by the city corporation when it acquired the railway. The rental for this piece was charged upon the right of way:—

Held, that, as the Act 4 Geo. V. ch. 63, an Act respecting the City of Brantford, set out distinctly the various incumbrances subject to which the city corporation was buying the railway, the rental charged upon the right of way should be paid or discharged out of the purchase-money in Court.

The costs of all parties other than the two representative coupon-holders were ordered to be paid out of the fund in Court; and the appeal of the coupon-holders was dismissed without costs.

AN issue directed to be tried for the purpose of determining the rights of different classes of holders of bonds and coupons issued by the defendants.

1918
—
TRUSTS
AND
GUARANTEE
CO.
LIMITED
v.
GRAND
VALLEY
R.W.
CO.

1918

TRUSTS
AND
GUARANTEE
CO.
LIMITED
v.
GRAND
VALLEY
R.W.
CO.

The issue was tried by FALCONBRIDGE, C.J.K.B., without a jury, at a Toronto sittings.

W. S. Brewster, K.C., for the bondholders under the mortgage of 1902 who had not exchanged their bonds.

W. Laidlaw, K.C., for Thomas Dixon (in the same interest).

A. C. McMaster and *J. H. Fraser*, for the bondholders under the 1902 mortgage who had exchanged their bonds and taken bonds of 1907, now seeking to be reinstated.

A. W. Ballantyne, for the bondholders of 1907 who never had 1902 bonds.

M. H. Ludwig, K.C., for coupon-holders under two issues of bonds, 1902 Brantford Street Railway Company and 1902 Grand Valley Railway Company.

J. R. Roaf, for coupon-holders under bonds of the Brantford Street Railway Company.

R. J. McLaughlin, K.C., appeared on the argument for the Home Life Assurance Company, who had exchanged bonds of 1902 for those of 1907.

September 10. FALCONBRIDGE, C.J.K.B.:—The evidence and arguments have been extended, wherein the facts and contentions are fully set forth.

The issues for trial are stated in a consent order made by me dated the 28th May, 1917, as follows:—

"1. This Court doth order and direct that the said several and respective claims, rights, and priorities of the said several and respective classes represented as hereinbefore mentioned, for the payment out of the money paid into Court as aforesaid, be tried and determined by this Honourable Court at a special sittings of the Court to be appointed for that purpose, and in default of appointment of a special sittings at the sittings of the non-jury Court at Toronto."

Exhibit 1 purports to be a concise statement of the issues to be tried. This statement contained the following particulars as to the mortgages and bonds:—

1. The mortgage dated the 30th May, 1902, from the Grand Valley Railway Company to the Trusts and Guarantee Company Limited to secure an issue of bonds to the amount of \$800,000. The bonds issued in pursuance of this mortgage amounted to \$450,000, with interest at 6 per cent.

2. The mortgage dated the 1st July, 1902, from the Brantford Street Railway Company to the National Trust Company Limited to secure bonds which were issued to the amount of \$125,000 with interest.

3. The mortgage dated the 27th August, 1907, from the Grand Valley Railway Company to the Trusts and Guarantee Company to secure bonds to the amount of \$4,000,000 and interest; bonds to the amount of \$1,774,500 and interest were issued in pursuance thereof.

4. The holders of original bonds under the first Grand Valley Railway Company mortgage—represented by Mr. Brewster and Mr. Laidlaw—hold bonds to the amount of \$60,000 and interest more or less.

5. The holders of the other original bonds under the said first Grand Valley Railway Company mortgage surrendered their bonds to the company to the amount of \$390,000—and received bonds in exchange therefor for a similar amount issued under and in pursuance of the second Grand Valley Railway Company mortgage—and the holders of these bonds are represented by Mr. McMaster.

6. The holders of the other bonds issued under the second mortgage to the amount of \$1,324,500 are represented by Mr. Ballantyne.

7. The grounds of claim of holders of coupons alleged to have been clipped from the mortgage bonds issued under the Brantford Street Railway Company mortgage—represented by Mr. Roaf.

8. The grounds of claim of holders of coupons alleged to have been clipped from bonds issued under the first Grand Valley Railway Company mortgage and from bonds issued under the second Grand Valley Railway Company mortgage—represented by Mr. Ballantyne.

9. The grounds of claim of holders of bonds issued under the second Grand Valley Railway Company mortgage, which they received in exchange for the surrender of the bonds under the first mortgage—represented by Mr. McMaster.

10. The grounds of claim of holders of bonds under the second Grand Valley Railway Company mortgage, which were original bonds and which were not received in exchange for other bonds under the first mortgage—represented by Mr. Ballantyne.

Falconbridge,
C.J.K.B.

1918

TRUSTS
AND
GUARANTEE
CO.
LIMITED
v.
GRAND
VALLEY
R.W.
Co.

Falconbridge,
C.J.K.B.

1918

TRUSTS
AND
GUARANTEE
Co.

LIMITED

v.
GRAND
VALLEY
R.W.
Co.

11. The grounds of claim of the holders of original bonds under the first Grand Valley Railway Company mortgage—represented by Mr. Brewster and Mr. Laidlaw.

The issues may be stated as follows, subject to explanatory comment by counsel, and any amendment which may be necessary:—

1. It is alleged by counsel for the holders of original bonds that the foundation of all the several and respective claims, rights, and priorities of the several and respective classes for payment out of the money paid into Court must be a legal right to a lien against the property included in the mortgages, and therefore a lien upon the money in Court.

2. The claim of the alleged holders of coupons is supposed to be that a verbal claim is made on their behalf that they paid the coupons and received possession of them.

3. The claim of the holders of original bonds under the first Grand Valley Railway Company mortgage is that they have a first lien on the property—and a first lien on the money.

4. The claim of the holders of bonds under the second Grand Valley Railway Company mortgage (1907) is a claim, “on the grounds of fraud and misrepresentation inducing them to make the exchange of the bonds under the mortgage of 1902 for bonds under the mortgage of 1907”—and that they are therefore entitled to a lien on the property and on the money.

The money in Court is identified by para. 5 of an order of my brother Latchford, bearing date the 1st March, 1917, as follows:—

“5. And this Court doth further order that the said receiver do forthwith pay into Court to the credit of this action the said sum of \$66,273.51, being the remainder of the balance in the receiver’s hands of the price on the sale to the Corporation of the City of Brantford of the property included in and covered by the mortgages to the Trusts and Guarantee Company Limited.”

Exhibit 2. The mortgage of 1902 covers the railway owned by the company constructed or thereafter to be constructed . . . and all charters, franchises, . . . now owned or possessed . . . or to be hereafter acquired by it . . .

Exhibit 3. The mortgage of 1907, reciting the issue of bonds under exhibit 2, is made subject to the lien, priority, and charges in favour of outstanding first mortgage bonds.

The transaction entered into by W. S. Dinnick and other directors, claiming also to be unsecured creditors of the company to the amount of \$100,000, with Verner and Drill, was a most extraordinary not to say an outrageous one. The details of it are set out, and they are of so improper a nature as to disentitle Dinnick or any other director who took part in it to rank on the assets of the company as coupon-holders or by any other species of claim.

As to the other 1902 bondholders who exchanged for 1907 bonds, the evidence is quite clear that they did so on the false and fraudulent representation that all the old bondholders had either exchanged or had agreed to do so; but I am of the opinion that I have no jurisdiction under the order to try this matter nor any questions except those which are set out therein. The parties for the disposal of this issue are not all before the Court. Therefore, although I have no doubt as to the merits, I cannot order the reinstatement of those who so exchanged their bonds.

And as to the coupon-holders, in any event I am of opinion that the effect of the transaction is that these coupons were paid and extinguished—not sold or transferred in such a way as to preserve a lien, and cannot now rank in priority.

The company paid the coupons on the exchange-bonds of 1907 until 1910. The holders of these bonds did not then repudiate the transfer nor offer to pay back the money.

All the claims put forward in competition with the bondholders under the mortgage of 1902 are disallowed, and these bondholders (having a clear priority) are declared to be entitled to the money in Court.

The order provides that the costs of the motion therefor shall be paid out of the money in Court.

The trial and determination of the claims are in the nature of an interpleader, and I make no order as to costs thereof.

Upon settlement of the judgment, a change was made as to costs.

The judgment, as settled and entered, declared that the holders of the original bonds secured by the mortgage dated the 30th May, 1902, were entitled to the moneys in court (\$66,273.51), so far as might be necessary to satisfy the amount due to them

Falconbridge,
C.J.K.B.

1918

TRUSTS
AND
GUARANTEE
Co.
LIMITED
v.
GRAND
VALLEY
R.W.
Co.

1918
TRUSTS
AND
GUARANTEE
CO.
LIMITED
v.
GRAND
VALLEY
R.W.
CO.

respectively, and ordered and adjudged accordingly; and ordered that the costs of the trial of the issue of the several persons appointed by the order of the 28th May, 1917, to represent and actually representing the various classes of claimants to the fund, including Thomas Dixon, be paid to them respectfully out of the fund.

The bondholders other than the bondholders of 1902 appealed from the judgment of FALCONBRIDGE, C.J.K.B., and the holders of coupons also appealed.

November 5 and 6. The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, J.J.A.

McMaster and *Fraser*, for holders of bonds of 1907 who took them in exchange for bonds of 1902, appellants, referred to an agreement which had been arrived at between their clients and the bondholders of 1902 who had not exchanged their bonds. They argued that their clients had been induced to make the exchange by false representations, and were entitled to be reinstated in their former position, and that the language used in the bonds issued in 1902 was wide enough to cover all property afterwards acquired by the Grand Valley Railway Company. As to the power of the company to pledge and mortgage all their assets, reference was made to secs. 136, 137, and 138 of the Railway Act; *Young v. McNider* (1895), 25 Can. S.C.R. 272, 277.

Ludwig, K.C., for the holders of certain detached coupons under the two bond issues of 1902, Brantford Street Railway Company and Grand Valley Railway Company, appellants, argued that *primâ facie* the present holders had paid their own money for these coupons, and the transfer did not have the effect of destroying their lien, or their right to rank with the outstanding bonds. He referred to *City of Kenosha v. Lamson* (1869), 9 Wallace 477; *Broadfoot v. City of Fayetteville* (1899), 32 S.E. Repr. 804; *Ketchum v. Duncan* (1877), 96 U.S. 659; *Simonson on Debentures*, 4th ed., p. 11.

W. T. Henderson, K.C., for the Corporation of the City of Brantford, added as a party at the hearing of the appeal, referred to an Act respecting the City of Brantford, 4 Geo. V. ch. 63.

Ballantyne, for bondholders of 1907 who never had 1902 bonds,

appellants, argued that the mortgage of 1902 included only franchises from municipalities through which the Grand Valley road was then authorised to be built.

Brewster, K.C., for bondholders of 1902 who had not exchanged their bonds, respondents, argued that his clients' rights were in the nature of a lien and that the appealing coupon-holders had no such right.

William Laidlaw, K.C., for Thomas Dixon, who was in the same position as the first set of respondents, referred to *In re National Live Stock Insurance Co.*, [1917] 1 Ch. 628.

Joshua Denovan, for the trustees of the Davies estate, respondents.

Roaf, for coupon-holders under bonds of the Brantford Street Railway Company, referred to the law in the United States of America: see Am. & Eng. Encyc. of Law, 2nd. ed., vol. 23, p. 823; Jones on Railroad Securities, secs. 330, 331; *Haven v. Grand Junction R.R. and Depot Co.* (1871), 109 Mass. 88.

December 20. The judgment of the Court was read by HODGINS, J.A.:—Appeal by all except bondholders of 1902 from the judgment of the Chief Justice of the King's Bench, who, on an issue directed by himself, ordered payment of the sum of \$66,273.51 to the bondholders of 1902. This amount, which is now in Court, comes from the sale, by the receiver of the Grand Valley Railway Company, of the Brantford Street Railway and the Grand Valley road between Brantford and Galt. The sale was under the Grand Valley mortgages of 1902 and 1907; that of 1902 including the Brantford to Galt railway and that of 1907 covering both, and as well what is known as the Thames Valley Railway. No evidence was given to enable the Court to say what proportion of the purchase-money was attributable to the Brantford Street Railway undertaking as distinguished from the Brantford to Galt railway, but it was stated that each had a separate value and had been operated separately.

The 1902 Grand Valley mortgage covered the Brantford to Galt railway, and the railway "constructed or which may be hereafter constructed (under the powers conferred) and all charters, franchises, privileges, and immunities now owned or possessed by it or to be hereafter acquired by it from any town or municipality

App. Div.
1918

TRUSTS
AND
GUARANTEE
Co.
LIMITED
v.
GRAND
VALLEY
R.W.
Co.

App. Div.
1918
—
TRUSTS
AND
GUARANTEE
Co.
LIMITED
v.
GRAND
VALLEY
R.W.
Co.

Hodgins, J.A.

or county or from any source whatever." It also included "all property whatever which may be hereafter acquired by it." It was argued that, notwithstanding these words, as the Grand Valley Railway Company in 1902 did not own and had no power to acquire the franchise of the Brantford Street Railway Company or the railway itself, the mortgage only included franchises from a town or county through which the Grand Valley road was then authorised to build.

And it is said, in consequence, if the claim of the holders of coupons from the Brantford Street Railway Company is disallowed, then the bondholders of the issue of 1907 come next to the \$125,000 bond issue of the Brantford Street Railway Company, and are entitled to the money in Court so far as it is derived from the sale of the street railway undertaking in Brantford itself.

The agreement for the sale which produced the money in Court is set out in the schedule to an Act respecting the City of Brantford, ch. 63 of the Ontario statutes of 1914, 4 Geo. V. The consideration is the assumption by the Corporation of the City of Brantford of three mortgages, one (dated the 1st July, 1902), for \$125,000, securing a bond issue for that amount on the Brantford Street Railway and interest thereon from the 1st July, 1913, the release of claims for taxes, payment of various liabilities, and \$90,100 in cash. This cash-payment, less certain deductions, is represented by the amount in Court.

During the hearing of the appeal, the Corporation of the City of Brantford was added as a party. At the same time counsel for the bondholders under the 1902 mortgage, and those under the 1907 who claim to be reinstated in the position they occupied prior to the exchange of bonds, came to an agreement as between themselves, which relieves the Court from deciding some of the questions that were in process of argument. By that settlement these parties agree to divide the sum in Court equally, after payment to the original 1902 bondholders of \$18,000 and the costs of the issues between them. Certain other provisions in the agreement may have to be dealt with hereafter.

There are two claims of coupon-holders to be considered. Dinnick and Pattison represent certain holders of coupons clipped from the issue of bonds covered by the mortgage for \$125,000 of the 1st July, 1902. on the Brantford Street Railway.

Dinnick claims \$25,000 and Pattison \$15,625, and they appear to be the only ones so claiming. Dinnick's coupons are pledged to the Dovercourt Land Company. Dinnick also represents holders of other coupons of the Grand Valley 1902 mortgage to the amount of \$11,600. There are unpaid coupon-holders under the 1907 mortgage, but no one appeared to argue for them (p. 49) unless the holders of 1907 bonds include these coupon-holders.

The coupons from the bonds of the Brantford Street Railway Company and those from the Grand Valley Railway bonds secured by the mortgages of 1902 are in the usual form, and the title to the money secured by them passes by the delivery of the coupons.

The bonds themselves state that both the principal and interest are secured by mortgage, and this is the case, so that as against each company, until the interest is actually discharged by it or for its benefit, the interest remains a charge under the mortgage, and the holder of a coupon is entitled to the benefit of that charge.

It cannot injure the Brantford Street Railway Company or the Grand Valley road, as mortgaged in 1902, if, that company not being able to pay the interest, some one else paid it and retained a claim for reimbursement; for, if the interest had not been got out of the way, foreclosure or sale might have been the result.

But as to the holders of the bonds, if the payment did not discharge the security, to that extent, in their favour, then it was left outstanding, and, therefore, in competition with them upon the assets mortgaged for their benefit. Either the insolvency of the company or the sale of its assets for a sum insufficient to pay both the principal and unpaid interest in full would make it important to determine what the transactions were under which the coupons were acquired, those of purchase or of payment and satisfaction. And this is the dispute in the present case.

The evidence is rather meagre and extremely vague, and, apart from the surrounding circumstances, the issue depends upon the sketchy testimony of Dinnick, Pattison, and Stockdale only. Dinnick was a director and vice-president of the Grand Valley Railway Company, and intimately aware, as his letter of the 12th October, 1909, to Mr. Warren (exhibit 16) shews, of the financial situation of all the companies concerned. He deposes to the fact that he personally paid for and purchased the coupons now out-

App. Div.
1918

TRUSTS
AND
GUARANTEE
Co.
LIMITED
v.
GRAND
VALLEY
R.W.
Co.

Hodgins, J.A.

App. Div.
1918
—
TRUSTS
AND
GUARANTEE
Co.
LIMITED
v.
GRAND
VALLEY
R.W.
Co.
—
Hodgins, J.A.

standing, detached from the bonds, after they became due. Stockdale, manager of the Trusts and Guarantee Company, the trustee for the bondholders under the Grand Valley 1902 mortgage, says the coupons were paid out of moneys supplied by Dinnick, in the sense that Dinnick, having borrowed from that corporation certain moneys, directed their application to the payment or purchase of these coupons. The correspondence between the then holders of the Brantford Street Railway bonds, the Canadian General Electric Company, and Dinnick, shews that they dealt with Dinnick on one or more occasions and accepted part cash and his personal note for overdue interest. Dinnick, in speaking of the Grand Valley Railway Company's coupons, says that a large majority of the bondholders knew he was buying the coupons; that they knew the road could not pay them, and came to him, after presentation to the Trusts and Guarantee Company without obtaining payment of them; and that he gave them cheques and got delivery of the coupons and told them he was paying them himself, and that the Trusts and Guarantee Company knew that also. He considers the letter of the 12th October, 1909, in which he assured Mr. Warren, general manager of the Trusts and Guarantee Company, that "all interest to the 1st July (1909) has been paid," was a proper letter to write, and that Mr. Warren knew the coupons had not been paid by the company. Dinnick says he paid them to protect the very large amount of money he had in the road. He never told the coupon-holders that he was *buying* their coupons. He began to pay for them in 1907, when Verner took over the road. He does not know whether in his own books he charged them to the Grand Valley Railway Company. He does not produce these books and does not account for them as being either lost or destroyed. As to the Brantford Street Railway coupons, Dinnick says that the holders, the Canadian General Electric Company, would make demand on the Brantford Street Railway Company, and that he would ask for delay and in the end have to "take up" the coupons himself. He thinks Mr. Nicholls knew that he purchased the coupons, because "he never cancelled the coupons," but Dinnick never told him so, and adds that Nicholls knew it was his money that took up the coupons because he gave his own personal cheque and note. He made no demand on the Brantford Street Railway Company, because it had no money. He produces letters between himself

and the treasurer of the Canadian General Electric Company, one from him asking for coupons "that I have paid in connection with the Brantford Street Railway Company," and the other enclosing a note for Dinnick's signature for \$1,570.20, the balance on a sum due for interest on these bonds, which Dinnick afterwards signed. There are other letters pressing for payment of the interest and addressed to Dinnick in Toronto. The coupons in question are all pledged to the Dovercourt Land Company. He admits that the directors, of whom he was one, sometimes provided the money with the Trusts and Guarantee Company, and he paid, he says, coupons on the 1907 mortgage for 5 years, but not all. A. J. Pattison, who was president and director of the Grand Valley Railway Company and subsidiary roads, about the end of 1907 or beginning of 1908, when he retired in favour of Verner, also claims to have purchased coupons of the Brantford Street Railway Company in 1905, 1906, and 1907, while he was president, from the National Trust Company, "by paying for them." He says the first coupons he paid were given to him stamped "paid," and that he told the National Trust Company that the railway company was not paying these coupons, and he would not pay any more unless they were delivered to him unstamped, and that his subsequent coupons were unstamped. He says that he personally and other members of a syndicate contributed the money for one instalment of coupons. In further examination he is unable to say just whether the money raised from the bank for the coupons was got upon the note of the Grand Valley Railway Company or on the covenant of the directors, but thinks the latter is the case. He sent his own cheque for the 1905 coupons, expecting to get the money back from the Grand Valley Railway Company. He deposited the coupons and bonds as security for money raised from the bank. Stockdale, now the receiver and also general manager of the Trusts and Guarantee Company, says that certain of the coupons were paid through that company as a "purely mechanical operation," and that if they received any money and had authority to pay the coupons they would pay them as long as the money lasted. He, however, says that they got moneys from Dinnick to pay coupons on the 1902 and 1907 Grand Valley mortgages, and did so, turning them over to Dinnick because he had provided the money to pay them, and, "We had agreed that we should deliver them to him."

App. Div.
1918
—

TRUSTS
AND
GUARANTEE
CO.
LIMITED
v.
GRAND
VALLEY
R.W.
CO.

Hodgins, J.A.

App. Div.

1918

—

TRUSTS
ANDGUARANTEE
Co.

LIMITED

v.

GRAND
VALLEY

R.W.

Co.

Hodgins, J.A.

Stockdale further says that exhibit 39 shews advances to Dinnick by the Trusts and Guarantee Company on collaterals which were used to pay coupons.

This evidence must be considered in the light of the whole operations of Dinnick and Pattison and the situation as it existed in 1907 and before. Pattison began his payments in 1905; "they were advanced from the day we took the road over," he says, and when he was president of the Brantford Street Railway Company. It may be noted that the Brantford Street Railway coupons were payable at the Canadian Bank of Commerce, and not at the National Trust Company's office. Stockdale says that, when the Trusts and Guarantee Company paid the coupons out of money supplied by Dinnick, the parties presenting the coupons did not know him in the transaction, and that they were paid "in the regular way." This is quite probably so, as, when the situation is considered, there seems every reason to suppose that no hint would be given that the companies concerned were not able to meet their interest obligations. The coupons of the Grand Valley Railway Company were in fact payable at the Trusts and Guarantee Company's office. No clear or satisfactory evidence is adduced as to any specific payment or purchase of coupons save what is disclosed in the correspondence between the Canadian General Electric Company and Dinnick, dealing with two occasions. The new bond issue which was intended to retire the earlier mortgages was, so far as put out, handed over to one Drill, acting for Verner, whose business ability and financial genius was expected not only to build the road but to finance it as well. Both Dinnick and Pattison say, either in terms or in effect, that they advanced their money to pay these coupons in the expectation that Verner, who had got the bonds in advance of the stipulated work, would make good, and hoping to keep things going till then. Both did so to protect their prior investments in the companies and they looked to the Grand Valley Railway to get their money back. Dinnick considered himself, and doubtless Pattison too, a creditor of that road. Pattison said he had a covenant from Verner to recoup him for his investment in connection with these roads. The handing over of the large amount of bonds to Verner and Drill and the retransfer of part of them to Dinnick, Pattison, and other directors, was most improper and unbusinesslike, and affords

another reason why quietude was advisable and an appearance of current solvency of prime importance to them. It, moreover, corroborates their statement that they looked to Verner and the proceeds of the bonds to recoup themselves, and the retirement of the coupons was a means to enable that end to be reached.

One element which is missing from the case as made is evidence that the bondholders knew that the person paying the coupons intended thereby to preserve not only the debt but the right to rank together with the bond for the interest payments, thereby reducing, in case of insolvency, the security of the bondholder for his principal.

Even the Canadian General Electric Company is not shewn to have known more than that Dinnick was making payment at a time when he was vice-president and was preserving the coupons. The other bondholders are said to have known the bare fact that their coupons were paid by Dinnick with his own money—a circumstance consistent with the preservation of the debt only. In Pattison's case, his refusal to accept cancelled coupons was only made known to the National Trust Company, the mortgagee to secure the \$125,000 of bonds of the Brantford Street Railway Company. Save in that instance, the evidence in itself is open to the objection that those who knew are not in any way identified, and it cannot be received as making even a *prima facie* case of knowledge as against any one unless that person is named and identified. It is singular that no one of the bondholders who are alleged to have known that their coupons were being purchased, and not merely paid, was called as a witness. It takes two to make a sale, and the total absence of any evidence save of the interested parties is not without its significance. The finding of the Chief Justice of the King's Bench upon the whole case is that the effect of the transactions was that none of the coupons were sold or transferred in such a way as to preserve their lien or the right to rank with the outstanding bonds.

The law in cases similar to the present one has been considered in many of the United States.

In *City of Kenosha v. Lamson*, 9 Wallace 477, it was decided that a holder of detached coupons could sue on them without being at the same time the holder of the bond. This was also the conclusion of the Ontario Court of Common Pleas in 1878 in the case of *McKenzie v. Montreal and Ottawa R.W. Co.*, 29 U.C.C.P. 333.

App. Div.
1918

TRUSTS
AND
GUARANTEE
Co.

LIMITED

v.
GRAND
VALLEY
R.W.
Co.

Hodg ins, J.A.

App. Div.
1918
—
TRUSTS
AND
GUARANTEE
Co.
LIMITED
v.
GRAND
VALLEY
R.W.
Co.
—
Hodgins, J.A.

As to the status of a coupon the Supreme Court of the United States in the *Lamson* case, 9 Wallace at p. 482, says:—

“The coupons are given simply as a convenient mode of obtaining payment of the interest as it becomes due upon the bonds. There is no extinguishment till payment.”

And at p. 484: “The device affords great convenience to all persons dealing in these securities, especially to the holders in foreign countries, who otherwise would be obliged to forward the bond to the place of payment of the interest each time it became due, or trust them to the hands of their correspondents in the country where the payment is made.

“This convenience in the collection by the use of coupons, as is apparent, very much facilitates the negotiation of these securities abroad, and enhances their value in the foreign market. And any decision that would have the effect to lessen or impair the higher security for the interest as found in the bond, by the use of these coupons, would necessarily, to that extent, defeat the purpose for which they were designed.”

That the coupon does not lose the benefit of the mortgage lien when detached is also clear.

In *In re Sewall v. Brainerd* (1865), 38 Vermont 364, the Supreme Court of Vermont held that, whether interest-coupons are negotiable or not, separate from the bonds, they are when matured a constituent part of the mortgage-debt, and an assignment of them carries with it by implication an interest in the mortgage-security; and it was said that upon realisation of the whole mortgaged property the bonds and the unpaid coupons would probably rank ratably. The bonds carried interest payable upon presentation of the coupons attached, and the whole bond issue was secured by mortgage upon the railway franchise and property.

In *Miller v. Rutland and Washington R.R. Co.* (1867), 40 Vermont 399, the Supreme Court of Vermont decided that a coupon, payable to bearer, detached from a bond, and owned by one party while the bond is owned by another, is still a lien under the mortgage given to secure the bond. A coupon, when payable, is a part of the mortgage-debt, and an assignment of a portion of the mortgage carries with it, in equity, a corresponding interest in the mortgage-security; and the coupon-dealer, in a foreclosure of the mortgage, is entitled to a *pro ratâ* distribution with the holders of the residue of

the mortgage-debt. This has been followed in other States. See *Commonwealth of Virginia v. Chesapeake and Ohio Canal Co.* (1870), 32 Md. 501; *Haven v. Grand Junction R.R. and Depot Co.*, 109 Mass. 88; *Union Trust Co. v. Monticello and Port Jervis R.W. Co.* (1875), 63 N.Y. 311; and *Cameron v. Tome* (1885), 64 Md. 507.

It is upon questions of fact, as to the result of the payment of the coupon by a third party, that the Courts have somewhat divided. But the law seems to have become fairly clear, its application only differing when the facts themselves are matters more of inference than positive proof.

In the *Miller* case (cited *ante*), the corporation being unable to pay interest on its bonds, an agreement was made between the directors and B. that B. should deposit his own money in the bank where the coupons were payable, and should take and hold them as his own under the mortgage. He did so, and instructed the clerk whose duty it was to pay them that he wanted the coupons uncanceled and given to him—B.'s claim was allowed, as there was no superior equity shewn. The Court, however, remarked (40 Vermont at p. 408):—

“A court of equity will not convert a payment into a purchase in favour of a party advancing the money when there is a superior countervailing equity in another party”—such as the right of bondholders to be paid in full in case of a deficiency to pay them and the coupons both.

In Maryland, the Court took a different view of a somewhat similar transaction. In *Commonwealth of Virginia v. Chesapeake and Ohio Canal Co.*, 32 Md. 501, the facts were as follows. The company being unable to pay the interest due in January, 1851, the directors met and appointed a committee to procure for the company a loan or advance to meet and discharge such interest. The president later reported that he had arranged with Selden Withers & Co. to make such advance for payment of the January coupons. The firm advanced \$50,000 at interest. This was repeated in July, 1851, and later. The coupons were handed over to Selden Withers & Co. Public notice was given to coupon-holders that the interest coupons would be paid at the banking house of Selden Withers & Co. The Court of Appeals held that this was an advance to the company to pay interest upon the security of the company's future resources, and not a purchase by Selden Withers & Co.

App. Div.
1918

TRUSTS
AND
GUARANTEE
CO.
LIMITED
v.
GRAND
VALLEY
R.W.
CO.

Hodgins, J.A.

App. Div.
1918
—
TRUSTS
AND
GUARANTEE
Co.
LIMITED
v.
GRAND
VALLEY
R.W.
Co.
—
Hodgins, J.A.

In *Haven v. Grand Junction R.R. and Depot Co.*, 109 Mass. 88, the Supreme Judicial Court of Massachusetts allowed a claim for coupons by Kimball, president and director of the company, who had supplied his own money, it being understood between the company and Kimball that they were not extinguished, and that he took the place of the persons who had presented them. "As between him and the company, this was an allowable arrangement, and a legitimate mode of furnishing pecuniary aid to the company, changing the form but not increasing the amount of its actual debt" (p. 97).

The security proved sufficient to pay the whole debt, principal and interest, no bondholder suffering any loss. But the Court add (p. 97):—

"The only parties who could have any right to object to this proceeding would be the other creditors of the company, to protect whose rights the mortgage was given. If the security had proved insufficient to pay the entire debt, the other mortgage creditors might say that . . . Kimball, having taken part in a transaction which appeared and was understood to be a payment, is estopped now to come forward as a purchaser and assignee, and thereby diminish the dividend which the other creditors, whose claims were covered by the mortgage, were entitled to receive."

In 1875, the Court of Appeals in New York State decided, in *Union Trust Co. v. Monticello and Port Jervis R.W. Co.*, 63 N.Y. 311, that:—

"Interest coupons upon the bonds of a railroad corporation received by one who has advanced the money with which they were taken up under an agreement that they were to be delivered to him uncanceled, as security for the advances, as against the corporation, are valid securities in the hands of the holder, and a mortgage upon the corporate property, given to pay the bonds, may be enforced for his benefit.

"But as between him and bondholders, who received the amount of their coupons in ignorance of the transaction, and supposing their coupons to have been paid, the latter have the prior equities, and if upon foreclosure and sale of the mortgaged property the sum realised is insufficient to pay the face of the bonds, the holder of the coupons is not entitled to share in the proceeds."

In 1877 the Supreme Court of the United States decided a very important case by a majority of one in a Court of nine. In *Ketchum v. Duncan*, 96 U.S. 659, they say (p. 662):—

“But that the coupons were either paid or transferred to Duncan Sherman & Co. unpaid, is plain enough. The transaction, whatever it was, must have been a payment, or a transfer by gift or purchase. Was it, then, a purchase? It is undoubtedly true that it is essential to a sale that both parties should consent to it. We may admit, also, that ‘where, as in this case, a sale, compared with payment, is prejudicial to the holder’s interest, by continuing the burden of the coupons upon the common security, and lessening its value in reference to the principal debt, the intent to sell should be clearly proved.’ But the intent to sell, or the assent of the former owner to a sale, need not have been expressly given. It may be inferred from the circumstances of the transaction. It often is. In the present case, the nature of the subject cannot be overlooked. Interest-coupons are instruments of a peculiar character. The title to them passes from hand to hand by mere delivery. A transfer of possession is presumptively a transfer of title. And especially is this true when the transfer is made to one who is not a debtor, to one who is under no obligation to receive them or to pay them. A holder is not warranted to believe that such a person intends to extinguish the coupons when he hands over the sum called for by them and takes them into his possession. It is not in accordance with common experience for one man to pay the debt of another, without receiving any benefit from his act. We cannot close our eyes to things that are of daily occurrence. It is within common knowledge that interest-coupons, alike those that are not due and those that are due, are passed from hand to hand; the receiver paying the amount they call for, without any intention on his part to extinguish them, and without any belief in the other party that they are extinguished by the transaction. In such a case, the holder intends to transfer his title, not to extinguish the debt. In multitudes of cases, coupons are transferred by persons who are not the owners of the bonds from which they have been detached. To hold that in all these cases the coupons are paid and extinguished, and not transferred or assigned, unless there was something more to shew an assent of the person parting with the possession that they should remain alive, and be available

App. Div.

1918

TRUSTS
ANDGUARANTEE
CO.

LIMITED

v.

GRAND

VALLEY

R.W.

Co.

Hodgins, J.A.

App. Div.
1918
—
TRUSTS
AND
GUARANTEE
Co.
LIMITED
v.
GRAND
VALLEY
R.W.
Co.
—
Hodgins, J.A.

in the hands of the persons to whom they were delivered, would, we think, be inconsistent with the common understanding of business men."

The reasons which commended themselves to the majority of the Court for allowing the claim on these coupons were as follows:—

First, the coupons were not paid by the railway company nor by money furnished by the railway company, nor in pursuance of an agreement with the company to pay them for or on behalf of the debtors or in extinguishment of the debt.

Second, the coupons were not paid in the usual manner or at the usual place, or by the persons accustomed to pay them. The coupons were not left at the company's office. They were taken there for verification, and then returned to the holders, with directions to take them to the bank, but no cheques drawn upon the bank were given to the holders, as had been the previous course. Some knew the company were not paying the coupons, others inquired and were told the bank would purchase. Others did not know the company would not pay, and made no inquiry at the bank; and, as they brought no cheques, the holders must have known the bank had no vouchers for its payments, unless the coupons continued in force in the hands of the bank. On this the Court held that it is a fair presumption that, when they delivered the possession, they assented to a transfer of ownership.

Third, none of the original holders of these coupons had up to that time denied the sale and purchase, and not one had reclaimed the coupons and thus disaffirmed any sale.

Fourth, notices were posted in the bank and in the office of the company, and public notice was given abroad. This was done in the most complete manner, and the Bank of Mobile and the Union Bank of London purchased the coupons for Duncan Sherman & Co. openly, both in Mobile and London, and acted as agents for the firm in so doing. Duncan Sherman & Co. had been the financial agents in New York of the company, and Duncan had been a director for several years, and in April, 1874, was elected its president. The coupons in question were those of May, 1874, and November, 1874. The Court, in dealing with him, say (pp. 665, 666):—

"The duty of Duncan was to do what in his judgment at the

time was the best thing for all persons for whom he was a trustee. It surely was not his duty to permit the coupons to go into default. Still less, as it appears to us, was it a breach of trust in him to purchase the coupons and hold them, in order that the company might have time to provide for their payment. The company was informed of his intention to make the purchase, and its consent was given."

The Court further held that there was no estoppel proved against Duncan. The company consented to what was done, and no single coupon-holder had come forward who now claimed that he was misled or deceived by any of Duncan Sherman & Co.'s agents. He was in no worse position than a stranger, unless it could be shewn that he was guilty of bad faith.

The Court (p. 667) considered the *Monticello* case, and, in their view, it was not a case of purchase or transfer: it was a case of agency for the debtor. In the ultimate result, it was held that in the hands of Duncan Sherman & Co. the coupons and the bonds ranked equally.

It may be observed that out of a Court of nine members the majority judgment was given by five, the minority judgment by four. The minority judgment was based upon the principle that those who presented the coupons for payment had no thought of selling them and did not in fact sell them, and therefore in law they were paid and not sold.

It is evident that the great publicity which was given to this operation, the undoubted good faith of Duncan Sherman & Co., and the clear proof of the origin of the transaction and of the ownership of the money which paid the coupons, were the determining factors in this decision.

In 1885 the Court of Appeals of Maryland, assuming to follow the cases in the Supreme Court and in New York and Massachusetts already cited, decided *Cameron v. Tome*, 64 Md. 507. It appeared that the coupon-holder arranged with the president of the company to advance the money to take up the coupons, and did so. The secretary of the company published a notice that the coupons would be paid at the company's office. The Court said (p. 510):—

"There is not a particle of proof to shew that the holders of these coupons ever sold or agreed to sell them to the appellant, or

App. Div.
1918
—
TRUSTS
AND
GUARANTEE
CO.
LIMITED
v.
GRAND
VALLEY
R.W.
CO.
—
Hodgins, J.A.

App. Div.
1918
—
TRUSTS
AND
GUARANTEE
Co.
LIMITED
v.
GRAND
VALLEY
R.W.
Co.
—
Hodgins, J.A.

that they were delivered to him with their knowledge or assent. They were due and it was the duty of the company to pay them. They constituted, so long as they remained unpaid, a part of the mortgage-debt, and an accumulation of unpaid interest would necessarily affect the value of the security held by the first mortgage bondholders. They had therefore a direct interest in having them paid and extinguished. The appellant advanced, it is true, the money to pay them, but he was a large holder of the second mortgage bonds, and was anxious to avoid a default on the part of the company, which might lead to a foreclosure and sale of the property of the company by the first mortgage bondholders. Besides, the agreement was one made between him and the company, and was unknown to the holders of the coupons, when they presented them for payment. This being so, we take the law to be well settled, that as against bondholders who presented their coupons for payment and not for sale, and who had the right to assume that they were paid and extinguished, a person who advances the money to take them up under an undisclosed agreement with the company, that the coupons should be delivered to him uncanceled as security for his advances, is not entitled to an equal priority in the lien, or the proceeds of the mortgage by which the coupons are secured. *Union Trust Co. v. Monticello and Port Jervis R.R. Co.*, 63 N.Y. 313; *Haven v. Grand Junction R.R. and Depot Co.*, 109 Mass. 96; *Ketchum v. Duncan*, 96 U.S. 662."

In 1888 the question again came before the Supreme Court of the United States in *Wood v. Guarantee Trust and Safe Deposit Co.* (1888), 128 U.S. 416, 9 Supreme Court Reporter 131. After quoting at length the reasoning of the same Court in *Ketchum v. Duncan*, Mr. Justice Lamar, who delivered the judgment of the Court, said (128 U.S. at p. 424):—

"That case clearly settles the proposition that in such a matter as this, the question, as between payment and purchase, is one of fact rather than of law, to be settled by the evidence, largely presumptive, generally, in the case. It is a question of the intention of the parties.

"In *Ketchum v. Duncan* stress was laid on these circumstances, viz., that the persons alleged to have paid the coupons had no connection with the company issuing the coupons, or interest in it; that they had repeatedly and publicly notified the holders of the

bonds and coupons that the coupons were to be purchased, not paid; and that the coupons were carefully received and preserved uncanceled. In the case at bar the conditions are radically different. Starr is essentially (that is, from a business point of view) the waterworks company, owning, as he does, 19,500 of its 20,000 shares of stock. Its prosperity is manifestly his prosperity, its disaster his disaster, and any disbursement made by it is substantially made by him. There is, therefore, no inherent improbability that he intended to *pay* the coupons, as he indeed instructed his agents, the brokers, that he did. Moreover, such notice as was given to call in the coupons, was notice of payment, not of purchase, so far as the evidence discloses the character at all. Finally, the coupons were cancelled by Starr; all of them being punctured and defaced by mucilage, and about one-half having the word "paid" written across them, in which condition they were received by the appellants. Looking to the testimony, we decline to disturb the finding of the Master and of the Circuit Court.

"The same consideration of the substantial identity between Starr and the waterworks company is of great weight in the determination of the remaining question as to the other 356 coupons. Whatever might be the right of a holder of overdue coupons cut from a bond which is afterwards sold to a *bonâ fide* purchaser, as between such purchaser and the coupon-holder that question does not arise here.

"The case before us is a peculiar one, and must be adjudged on its own facts. As we have already said, Starr was, from a business point of view, substantially the company. Not only was it his object to float the bonds, but to float the company as well. Hence, when he came to sell these bonds, he arranged with his brokers, Beasley & Co., in reference to the July coupons (series No. 2). Under that arrangement, such of the coupons as were attached to, and had been sold with, the bonds sold early in the year 1881, were paid by Beasley & Co., the price was charged to Starr, and the coupons were delivered to him. Such of the coupons as were attached to the bonds not themselves sold until the month of June, 1881, were detached from the bonds before sale, and were not charged to Starr, but were delivered to him as property of the company. The coupons of January, 1881, were all detached from the bonds before they were deposited with Beasley.

App. Div.
1918

TRUSTS
AND
GUARANTEE
Co.
LIMITED
v.
GRAND
VALLEY
R.W.
Co.

Hodgins, J.A.

App. Div.
1918
—
TRUSTS
AND
GUARANTEE
Co.
LIMITED
v.
GRAND
VALLEY
R.W.
Co.
—
Hodgins, J.A.

"Now, why all this arrangement and management? To use the language of Mr. Beasley: 'It would have been irregular and unbusinesslike to offer for sale or attempt to dispose of the bonds, *not then known in the market*, with overdue coupons attached.' In brief, Starr was engaged in floating these bonds. They were not, as the testimony and the history of the case shews, good bonds. He was very careful to prevent anything from transpiring that would injure their credit. He cut off the coupons that were due and unpaid, so long as the bonds remained in his possession, and put up some money to redeem coupons which fell due on bonds that had been sold, so long as he was still engaged in selling other bonds. It looks very much as if Mr. Starr had dug a pit, and was anxiously keeping the pathway to it in good order. It would be inequitable, in our opinion, to allow him to bring forward these coupons as the basis of any preference over, or of even coequal rights with, those to whom he sold his bonds; and the plaintiff, having taken these coupons when overdue, had no greater rights then he had in this respect. If the courts were to sanction such claims, the commercial securities of the world would be nullified."

In *Hollister v. Stewart* (1889), 111 N.Y. 644, Finch, J., in delivering the opinion of the Court, thus refers to two of the earlier cases (p. 663):—

"While it may be that the overdue coupons bought by the contractors before 1875, were purchases and not payments, because the then owner of plaintiff's bonds assented to the arrangement, no such fact is proven as to the purchase of 1875. As to those coupons there is not a word of evidence that those who accepted their money made or intended a sale. (*Union Trust Co. v. Monticello and Port Jervis R.W. Co.*, 63 N.Y. 311.) Those coupons as against the bondholders must be regarded as paid. In *Ketchum v. Duncan* (96 U.S. 659), where modifying circumstances were shewn and the transaction was regarded as a sale, there was yet a very formidable dissent."

In *Venner v. Farmers' Loan and Trust Co.* (1898), 90 Fed. Repr. 348, Mr. Justice Lurton, with whom were sitting Taft, J., and Severens, Dist. J., in delivering the judgment of the Circuit Court of Appeals, looks to *Ketchum v. Duncan* for approval of his statement that it is a "sound principle of law that the holder" (of coupons) "must intend a sale, and consent to a sale, and a mere

transfer of title, when he parts with such preferred coupon, or the transaction will be treated as a cancellation and payment" (p. 359).

He repeats as true doctrine what is said in the case alluded to: "Where a sale with payment is prejudicial to the holder's interest, by continuing the burden of the coupons upon the common security, and lessening its value in reference to the principal of the debt, the intent to sell should be clearly proven" (p. 359). *Wood v. Guarantee Trust and Sale Deposit Co.* (*ante*) is also referred to with approval.

The case of *Baker v. Meloy* (1902), 95 Md. 1, deals with the cases already cited. The Maryland Court of Appeals treat the *Ketchum* and *Wood* cases as having settled the point that purchase or payment is a question of fact, depending upon the intention of the parties. In discussing the former, it alludes to the reliance placed by the Court on evidence shewing that the circumstances did not defeat the clearly proved intent of the purchasers not to retire and pay the coupons, but to preserve them outstanding.

As I read these cases, and I find no English or Canadian authority inconsistent with them, the real test whether there was a payment in satisfaction or by way of a purchase, lies in the knowledge and intention of both parties to that payment—which knowledge may be inferred from the circumstances; and, in case of doubt, the scale will be turned against the idea of purchase either by the want of proof of mutual intent or by the fact that there is not enough in the security to pay the principal of the debt and the coupons as well, so that a purchase would be prejudicial to the bondholder.

There can be little doubt that when these payments began to be made in 1905 by Pattison, and in 1907 by Dinnick, the dominating idea was to prevent the road or roads from going into bankruptcy, so as to enable them to be amalgamated with a larger scheme which would make the fortunes of those associated with it. In 1902 the idea of beginning the building of a road from Port Dover to Goderich was in contemplation, and the mortgage of that year secured a bond issue of \$800,000, which was more than double the amount permitted by statute for the 12 miles then contracted for. It provided that \$240,000 of bonds should be issued and re-delivered to the directors for this 12 miles, and the remainder upon proof of actual construction of further mileage. The mort-

App. Div.
1918

TRUSTS
AND
GUARANTEE
Co.
LIMITED
v.
GRAND
VALLEY
R.W.
Co.

Hodgins, J.A.

App. Div.
1918
—

TRUSTS
AND
GUARANTEE
CO.
LIMITED
v.
GRAND
VALLEY
R.W.
CO.
—

Hodgins, J.A.

gage pledged after-acquired charters and franchises, and provided for further instruments to cover additional properties.

In 1904 Pattison, through his company, the Canadian Homestead Loan and Savings Company, began to be interested in the Grand Valley Railway Company, and in 1906 he was a director, if not president, and made declarations as to construction required for the issue of bonds. He was also president of the Brantford Street Railway Company in 1905 and later. He gives as his reason for furnishing money to the extent of \$46,000 the hope that the roads would finally become profitable or that the extensions which would make them profitable could be carried out.

Dinnick began paying for coupons in 1907, after having advanced some \$143,000 in like manner. His company purchased the Canadian Homestead Loan and Savings Company, and so acquired its bonds. In short, both personally and financially, Pattison and Dinnick were vitally interested in the success of the scheme eventually carried out in 1907 by the handing over of the whole bond issue of the reorganised road to Verner and Drill. That transaction by these two parties is only consistent with the idea that by paying the coupons they had established a claim on the Grand Valley Railway Company, and not with that of a lien ranking equally with the principal, for the reservation of bonds was only to the extent of the principal of the three bond mortgages, i.e., \$125,000, \$140,000, and \$450,000, these being the bonded indebtedness of the Brantford Street Railway Company, the Thames Valley road, and the Grand Valley Railway Company. When bonds for the \$715,000 were to be issued to retire these existing debts, any unpaid interest coupons would consequently have to be met from the proceeds of the bonds issued to Verner and Drill or to these two claimants.

To sum the matter up, there appears to be an absence of satisfactory proof of the independent origin of the transactions which are set up as purchases. None of the *indiciæ* of candour and publicity which are relied on in the cases I have cited are evident here. The payments are made casually and by those having large controlling positions in the companies affected. The trustees of the mortgages are either employed to make the payments or to receive them and transfer the coupons, without any express notice to the bondholders. In the end it is found that those who claim to be

coupon-holders had themselves engaged agents to secure an exchange of bonds of the 1902 issue for other bonds, which issue was to be based, according to their own resolution, on previous provision for the amount outstanding having been made. That provision only reserved bonds for the net amount of principal, and took no account of these large sums now said to be outstanding for interest.

It is fair to observe that, if the proper conclusion is that the transactions amounted to a transfer of the coupons so as to preserve only a right of action against the Grand Valley Railway Company, but without the right to compete with the bonds in ranking on the security, the action of Dinnick and Pattison would not be deserving of criticism. It is the setting up of the lien that necessitates the strict proof of knowledge or acquiescence in those bondholders who presented their coupons and received their money under the impression that they were being satisfied.

Having regard to the importance attached by the Courts in all these transactions to candour, publicity, and fair dealing, I cannot satisfy myself that the view entertained by the learned Chief Justice is erroneous, and I think the appeals of the coupon-holders must be dismissed with costs.

It is, in the circumstances, not necessary to consider the question of the effect of the Statute of Limitations.

If in the class of coupon-holders represented there are any who do not claim either through Pattison or Dinnick, different considerations may apply, but none were mentioned on the appeal, and no evidence was given shewing that any other persons held coupons.

It was, however, pointed out on the argument that the bondholders who claimed a return of their 1902 bonds and the cancellation of the agreement for exchange entered into by them, were not, in this proceeding, entitled to relief *en masse*. The misrepresentation proved at the trial was sought to be made applicable to the whole class there represented. But this cannot be done. Each bondholder who signed the agreement and exchanged his bonds must get relief because he was personally misled, and he cannot take advantage of the wrong done to another. The case must therefore go to the Master to allow the individual bondholders to prove their claims for rescission, and the judgment should specially direct that they may do so, and that the Master must in

App. Div.
1918

TRUSTS
AND
GUARANTEE
CO.
LIMITED

v.
GRAND
VALLEY
R.W.
CO.

Hodgins, J.A.

App. Div.
1918
—
TRUSTS
AND
GUARANTEE
CO.
LIMITED
v.
GRAND
VALLEY
R.W.
CO.
—
Hodgins, J.A.

each case deal with the claim as if an action for rescission and reinstatement had been brought by each individual bondholder.

In addition to this, the matter is further complicated by the fact that the fund is derived from the sale of two railways, each with a different bond issue upon it, and no division has been made of the sum realised from both undertakings combined.

The point raised by Mr. Ballantyne, to which I alluded at the outset, namely, that, in case of the disallowance of the coupon claims, the bondholders of 1907 come next to the Brantford Street Railway bonds on that undertaking, and in priority to the 1902 bondholders, was not fully argued. If that contention were to prevail, perhaps the holders of 1907 exchanged bonds would not desire to proceed further with their claim for reinstatement under the 1902 mortgage, if that mortgage were confined to the Brantford and Galt section. The amount realised by the sale from each railway may become important if the 1902 bondholders are restricted to the section outside Brantford. These two matters may and should be considered by the parties interested, and if any of them desire it the case may be mentioned again at the opening of the sittings in January, 1919, as to the priority of the 1902 mortgage and the necessity for the division of the amount in Court, when the costs can also be dealt with.

The Corporation of the City of Brantford should be added as a party formally, and the agreement entered into between counsel for the 1902 bondholders and the exchange bondholders may be confirmed, if desired, so far as it is in conformity with the views expressed herein or those developed later if the case is mentioned again.

January 27, 1919. The Court heard counsel upon the matters referred to at the end of the above judgment.

Ballantyne, for the bondholders of 1907.

McMaster and *Fraser*, for the bondholders of 1907 who exchanged bonds.

Brewster, K.C., for the bondholders of 1902.

Ludwig, K.C., and *Roaf*, for coupon-holders.

Henderson, K.C., for the Corporation of the City of Brantford.

February 10. The judgment of the Court was read by HODGINS, J.A.:—Since the delivery of the former judgment in

this case, the matter has been spoken to on the question of the effect of the mortgage of the 30th May, 1902, as regards the franchise within the City of Brantford.

Power to acquire the Brantford Street Railway or the franchise under which it operated was not in fact possessed by the Grand Valley Railway Company until 1906, but reliance was placed upon the mortgage of the 30th May, 1902, as being wide enough to include property afterwards acquired, although there was no power to acquire it at the time the mortgage was given.

I think the words of the mortgage are comprehensive enough, and the principle to be applied is covered by the following statement of Jessel, M.R., in *Collyer v. Isaacs* (1881), 19 Ch.D. 342, at p. 351:—

“A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment.”

The mortgage in question recites the passing of by-law No. 12 by the Grand Valley Railway Company authorising the issue of bonds which are by sec. 8 to be secured by a mortgage, which mortgage-deed shall create such mortgages, charges, and incumbrances upon the whole of such property, assets, rents, and revenues of the company, present or future or both, as the directors shall see fit to have described in such mortgage-deed. The mortgage then goes on to pledge “the railway owned by the said company constructed or which may hereafter be constructed pursuant to the powers granted by the hereinbefore in part recited statutes of Canada . . . and also all and singular the right, title, and interest of the said railway company, of every kind and nature, in and to its lines of railway in and between the places mentioned in said statutes, including as well that portion thereof which may be hereafter constructed as that which is now constructed, and all charters, franchises, privileges, and immunities now owned or possessed or acquired by it or to be hereafter acquired by it from any town or municipality or county, or from any source whatever; . . . and all property whatsoever which may hereafter be acquired by it; and it is intended that the specific description of

App. Div.
1919.

TRUSTS
AND
GUARANTEE
CO.
LIMITED
v.
GRAND
VALLEY
R.W.
CO.

Hodgins, J A

App. Div.
1919

TRUSTS
AND
GUARANTEE
Co.
LIMITED
v.
GRAND
VALLEY
R.W.
Co.

Hodgins, J.A.

property and rights above written shall in no way be taken as restrictive of the general description herein contained."

The mortgage contained a covenant as follows:—

"The company and the trustee severally agree, upon reasonable request, to execute further instruments and to do such further acts as may be necessary or proper to carry out more effectually the purpose of this mortgage, and the company agrees to execute, acknowledge, and deliver to the trustee from time to time all such deeds, conveyances, and instruments as may be necessary or proper to place under the lien of this mortgage all additional properties, improvements, grants, rights, privileges, franchises, immunities, and exemptions which the company shall hereafter acquire."

These provisions, it seems to me, are wide enough to cover the right of franchise of the Brantford Street Railway Company when that company passed into the control of the Grand Valley Railway Company, and it would be proper to hold that the mortgage in question ranks now in priority to that of 1907 upon the Brantford Street Railway as well as that running from Brantford to Galt.

Lord Westbury in *Holroyd v. Marshall* (1862), 10 H.L.C. 191, 211, said:—

"If a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired."

Mr. Henderson brought up a point not mentioned on the last argument, that is, the rental claimed by Smith for a piece of property not taken over by the City of Brantford when it acquired the railway. The rental for this piece is charged upon the right of way; and, as the statute (4 Geo. V. ch. 63) sets out distinctly the various incumbrances subject to which the City of Brantford was buying the railway, I think this rental charged upon the right of way should be paid or discharged out of the purchase-money, and that this should be referred to the Master to be dealt with in his distribution of the fund in Court.

Upon the question of the costs of the coupon-holders, it was suggested that the learned Chief Justice of the King's Bench had given the parties whom he had directed to represent the classes costs out of the fund, and that they should not on appeal be ordered to pay costs of the other parties in view of the importance of the questions raised and the amount involved.

On the whole, probably, justice will be done by directing that upon the question of the priority of the coupon-holders they should not be required to pay the costs of the other parties. Those costs might fairly be taxed and paid out of the fund, as the whole dispute has arisen owing to the dealing of the company itself, which has produced a good deal of confusion among the respective classes of bondholders. The order for costs therefore out of the fund will cover the costs of all parties other than the two representative coupon-holders, and will include both previous arguments and the one on the 27th January, 1919. The appeal of the coupon-holders will be dismissed without costs.

App. Div.
1919
—
TRUSTS
AND
GUARANTEE
CO.
LIMITED
v.
GRAND
VALLEY
R.W.
CO.
—
Hodgins, J.A.

Judgment below varied.

[APPELLATE DIVISION.]

1918
Dec. 20.

REX v. DEBARD.

Criminal Law—Bigamy—Woman Going through Form of Marriage with Man Knowing that Man's Wife still Living—Evidence—Proof of First Marriage—Foreign Law—Justice of the Peace—Correspondence—Admissibility—Sufficiency to Warrant Conviction—Stated Case—Form of Question.

The defendant was convicted of bigamy—the offence being that she went through a form of marriage with H., “knowing at the time his wife was living.” The case of the Crown was that H. was married to Anna M., in 1873, at a place in the State of Iowa, by a Justice of the Peace having authority under the law of that State to solemnise marriage, and that Anna M. was living when the defendant went through the form of marriage with H. Proper proof was adduced of the law of Iowa, and it was shewn that in 1873 a Justice of the Peace was by that law authorised to solemnise marriage. Anna M. testified that the marriage took place at the time mentioned; that it was solemnised by C., who held the office of Justice of the Peace; that she and H. lived together as man and wife for 20 years after the marriage; and that a son, issue of the marriage, was born in 1874, and was still living. A certificate of the marriage, signed by C., a certificate of the record of the marriage, signed by the clerk of a District Court in Iowa, and correspondence between H. and Anna M. in 1917 and 1918, were also admitted in evidence:—*Held*, that there was sufficient proof of the marriage without the aid of the certificates and correspondence.

1918
—
REX
v.
DEBARD.

The correspondence between the husband and wife was admissible as evidence of the status of the parties, though not relevant upon the question of the defendant's knowledge that H. was a married man.

No evidence was improperly admitted, whereby a substantial wrong or miscarriage was occasioned on the trial.

There was some evidence, properly admissible, that the defendant knew that Anna M. was the wife of H. and was living when the defendant went through the form of marriage with H., viz., the testimony of Anna M.'s son that the defendant asked him to aid H. in getting a divorce, and a letter written by the defendant herself in 1918.

Proper form of question in stated case as to the sufficiency of evidence to warrant a conviction, indicated.

THE following statement of the facts is taken from the reasons for judgment of MEREDITH, C.J.O.:—

Case stated by the Senior Judge of the County Court of the County of York.

The prisoner was charged with and convicted of the offence of bigamy—the offence being that she went “through a form of marriage with Judson B. Hogate, knowing at the time his wife was living.”

The questions submitted for our opinion are:—

1. Was I right in holding that the first marriage in the State of Iowa was sufficiently proved?

2. Was any evidence improperly admitted, whereby a substantial wrong or miscarriage was occasioned on the trial?

3. Was I right in law in convicting the accused upon the evidence properly admissible; and if not should the conviction be quashed?

The case of the Crown was that Hogate was married to Anna Moore on the 20th February, 1873, at Jefferson County in the State of Iowa, by a Justice of the Peace having authority under the laws of that State to solemnise marriage, and that Anna Moore was living when the prisoner went through the form of marriage with Hogate.

Proper proof was adduced of the law of Iowa, and it was shewn that a Justice of the Peace was, at the time the marriage took place, one of the persons who were by that law authorised to solemnise marriage.

The fact of the marriage having taken place at the time mentioned was deposed to by Anna Hogate, the wife, who also testified that it was solemnised by George H. Case, who held the office of Justice of the Peace; that she and her husband lived together as

man and wife for 20 years after the marriage; and that a son, issue of the marriage, and still living, was born on the 13th August, 1874.

In addition to this evidence, a certificate of the marriage, signed by Case, and a certificate of the record of the marriage, signed by the clerk of the District Court of Jefferson County, and also correspondence between Hogate and his wife in the years 1917 and 1918, were admitted in evidence, notwithstanding objection by counsel for the prisoner that they were not admissible.

1918
REX
v.
DEBARD.

December 16. The case was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

H. H. Dewart, K.C., for the prisoner, argued that there was no sufficient proof of the Iowa marriage. There was no proof that George H. Case, by whom the marriage was said to have been solemnised, was a Justice of the Peace at that time; and the evidence adduced as to the law of Iowa was inadequate. Reference was made to secs. 23 and 28 of the Canada Evidence Act, R.S.C. 1906, ch. 145; *Regina v. Smith* (1857), 14 U.C.R. 565, 568. There was no evidence of *mens rea* on the part of the prisoner; Anna Moore had not lived with Hogate since 1893.

Edward Bayly, K.C., for the Crown, referred to Crankshaw's Criminal Code, 4th ed., p. 335, and cases there cited, as to presumptive evidence in such cases. There was sufficient evidence to throw the onus of rebutting it upon the prisoner. He referred to *Rex v. Inhabitants of Brampton* (1808), 10 East 282.

Dewart, in reply, argued that there was no evidence that Case was a Justice of the Peace for the locality in which the marriage was said to have taken place. His powers were territorial only, and were confined to his own locality.

December 20. The judgment of Court was read by MEREDITH, C.J.O. (after setting out the facts as above):—There was, in our opinion, sufficient proof of the marriage without the aid of the certificates and correspondence.

It was contended by counsel for the prisoner that there was not sufficient evidence of the marriage because it was not proved that Case was a Justice of the Peace having jurisdiction to solemnise marriages in Jefferson County.

Assuming that the certificates were not admissible in evidence,

App. Div.
1918
—
REX
v.
DEBARD.

Meredith, C.J.O.

without them there was evidence by the wife that Case was a Justice of the Peace, and in addition to this there is the presumption that a person acting in a public or official capacity is entitled so to act.

The correspondence between the husband and wife was admissible as evidence of the status of the parties, though it was not relevant upon the question as to the prisoner's knowledge that Hogate was a married man.

For these reasons the first question should be answered as follows:—

There was evidence, apart from that afforded by the certificates, which, if believed—as it was by the trial Judge—sufficiently proved the first marriage.

And the second question should be answered in the negative.

The third question, as framed, is not a proper one: it should have been, Was there evidence which, if believed, warranted a conviction? Or, perhaps, “Was there any evidence, properly admissible, to warrant a conviction?” And, in answering it, I will so treat it.

To answer this question it is necessary to consider whether there was any evidence that the prisoner, when she went through the form of marriage with Hogate, knew that his wife was living. That she knew that the woman to whom it has been found that he was married was then living is clear, and there was evidence which, if believed, warranted a finding that she also knew that that woman was the wife of Hogate. According to the testimony of the son of the marriage, he had a conversation with the prisoner 23 or 24 years ago, in which she asked him if he could not aid in some way “to get his father to get a divorce,” and that he replied that he would “not do anything of that kind at all.” If this conversation took place, it must have referred to a divorce from the marriage with Anna Moore, and was evidence that the prisoner knew that Anna Moore was Hogate's wife.

It was argued by Mr. Dewart that the prisoner testifying on her own behalf deposed that this conversation had not taken place, and that Hogate had assured her, and that she believed, that he was not a married man, and that Anna Moore was not his wife but his mistress.

We are not called upon to consider, and have no jurisdiction to decide, whether the trial Judge was right in accepting, as he did, the testimony of the son, in preference to that of the prisoner. All that we have to do is to determine whether there was any evidence of the prisoner's knowledge.

The letter which the prisoner wrote on the 27th February, 1918, when the wife was proposing to go to Toronto to see her husband, affords some evidence that the prisoner knew that she was the wife of Hogate. Referring to the suggested visit, she wrote:—

“It must be prevented at any cost, for I am afraid the shock will surely kill him. As for myself, I care nothing absolutely for the scandal it would cause, but I am chiefly concerned for the one who has been my life's companion for nearly 24 years.”

The proper answer to the third question is: There was evidence, properly admissible, sufficient to warrant a conviction.

Reference may be made to the opinion stated by my brother Maclaren, delivering the judgment of the Court of Appeal in *Rex v. Naoum* (1911), 24 O.L.R. 306, which contains an elaborate and able review of the authorities bearing upon some of the questions we have had to consider.

It is satisfactory to know that it is not proposed to inflict any punishment upon the prisoner for the offence of which she has, rightly we think, been convicted. The ends of justice do not require that, having regard to all the circumstances, a different course should be taken.

Conviction affirmed.

App. Div.

1918

REX

v.

DEBARD.

Meredith, C.J.O.

1917

[APPELLATE DIVISION.]

Dec. 15.

STOTHERS V. TORONTO GENERAL TRUSTS CORPORATION.

1918

Dec. 20.

Railway—Issue of Bonds—Payment of Part of Issue Guaranteed by Municipal Corporations under Authority of By-laws Set out in Schedule to 8 Edw. VII. ch. 135 (O.)—Mortgage Securing Bonds Made by Railway Company to Trustee—Confirmation by 9 Edw. VII. ch. 139 (O.)—Sale of Bonds by Trustee—Payments Made by Trustee to Railway Company—Construction of clause 3 of Mortgage-deed—Order of Court under Rule 938 et seq. of Con. Rules of 1897—Absence of Notice of Motion—Effect of—Waiver—Omnia Presumuntur rite esse Acta—Representation of Municipal Corporations by one of four—Order for—Rules 193, 200—Jurisdiction—Validity of Order—Binding Effect upon all four Corporations—Payments Made upon Progress Certificates Issued by Engineer of Railway Company—Proportion of Guaranteed Bonds to Unguaranteed where Latter not Sold—Exhaustion of Fund—Percentage to be Retained—Payment on Pro Rata Basis—Duty of Trustee—Protection of Trustee by Exculpatory Provisions of Mortgage-deed—Acting in Good Faith and Honestly and Reasonably—Trustee Act, sec. 37—Advice of Court under sec. 66—Limitations Act, sec. 47—Interest on Proceeds of Sale of Unguaranteed Bonds—Beneficial Interest of Municipal Corporations under Mortgage-deed—Status as Plaintiffs in Action against Trustee.

A railway company issued bonds secured on its railway to the amount of \$400,000, guaranteed by four municipal corporations, and bonds to the amount of \$200,000, not so guaranteed. The guaranteeing of the bonds was authorised by by-laws of the councils of the four corporations, set out in schedules to the Act 8 Edw. VII. ch. 135 (O.) A mortgage securing the bonds was made on the 1st May, 1908, by the company to the defendant, as trustee, confirmed by 9 Edw. VII. ch. 139 (O.), and set out in a schedule thereto. The guaranteed bonds were delivered to the trustee, and were disposed of by it, and \$384,000 was realised from the sale, the whole of which sum, except \$30.06, was paid out by the trustee to the railway company, on progress certificates signed by the company's chief engineer. The payments made were to the extent only of 90 per cent. of the "face value" of the certificates. The trustee acted upon the view that the railway company was entitled to receive $6\frac{2}{3}$ per cent. of the money in the trustee's hands—that is, the proportion which the amount of the guaranteed bonds, \$400,000, bore to the amount of all the bonds that had been issued, \$600,000. Ninety per cent. of the "face value" of the progress certificates issued exceeded \$400,000; and a question arose as to whether the railway company was entitled to be paid the whole of the money in the hands of the trustee, although it would exhaust the 10 per cent., which was to be paid only after the completion and opening of the railway. This question was submitted to a Judge of the High Court (MIDDLETON, J.), counsel representing the railway company, the trustee, and one of the four guaranteeing municipal corporations (A.), going before the Judge, without service of a formal notice of motion (so far as appeared), and asking him to determine the rights of the parties. An order was first made that A. should represent all the municipal corporations interested. Then the matters in controversy were argued, and after the argument a written argument (raising a new point, as to the method of payment by the trustee) was placed before the Judge by the solicitor for G., another of the guaranteeing corporations. The Judge on the 13th April, 1911, gave a considered judgment, treating the motion as one made under the originating notice provisions of the Rules then in force (Consolidated Rules of 1897, No. 938 et seq.): *Re Ontario and West Shore R.W. Co.*, 2 O.W.N. 104; and by an order, duly passed and entered, declared and adjudged that, upon the trustee receiving from time to time progress certificates of the chief engineer of the railway company, certifying to 90 per cent. of the value of services and materials done or supplied in the construction of the railway to the date of such certificates, it was the duty of the trustee, in every such case, to pay to the railway com-

1917-18
 STOTHERS
 v.
 TORONTO
 GENERAL
 TRUSTS
 CORPORATION.

pany, out of the moneys in the trustee's hands, proceeds of the sale of the guaranteed bonds, two-thirds of the 90 per cent. set out in such progress certificates, and to make payments from time to time, notwithstanding that the moneys in the trustee's hands might, by payments made in accordance with such certificates, be wholly exhausted before the completion and opening of the railway; that all payments theretofore made by the trustee, to the extent of two-thirds of 90 per cent. of the amount set out in the certificates, had been properly made by the trustee in accordance with the terms of the mortgage; and that the trustee "do make payment accordingly out of the said proceeds and to the extent only of the said proceeds in its hands from time to time." The trustee acted upon this order, and, in accordance with its provisions, paid over to the railway company the whole of the money which had come to its hands except the small balance mentioned and \$317.96, the balance payable to the company in respect of interest upon moneys in the hands of the trustee. By 3 Geo. V. ch. 135 (O.), the charter and all assets of the railway company were vested in S. as trustee for the four guaranteeing corporations, and this action was brought by S. and the four corporations against the trustee for an account and other relief.

The action was dismissed by the judgment of SUTHERLAND, J., who held that he was bound by the order of MIDDLETON, J.; and the judgment was affirmed by a Divisional Court (HODGINS, J.A., dissenting in part).

Per MEREDITH, C.J.O.:—Service of a notice of motion was not essential to give jurisdiction to the Court to deal with the case presented under Rules 938 *et seq.*; the person who, under Rule 939, was the person to be served, being willing to waive the formality of a notice and to go before the Court, that course might properly be taken; the parties were properly before the Court, and it was for the Court to determine whether any other person ought to be served, and, if so, who; what was done was, though in form a direction that one of the municipal corporations should represent the others, in reality a determination by the Judge that the corporation which was before him sufficiently represented the interests of all the corporations, and that it was not necessary that any other than the persons before him should be served (Rule 940); the matter in controversy came within clause (h) of Rule 938—"the determination of any question arising in the administration of the estate or trust;" the only right which the municipal corporations had against the trustee was as *cestuis que trust* under the mortgage-deed; although there was no contractual relation between them and the trustee, when the bonds or proceeds were handed over to the trustee, they became impressed with the trust declared by the mortgage-deed as to the application of them by the trustee.

The order was therefore a valid order and binding on all the corporations, and so their claim failed, except as to the two small sums which were admitted to be in the trustee's hands.

The railway company was entitled to be paid the full 90 per cent. of the aggregate amount of the progress certificates, although the payments exhausted the whole fund in the hands of the trustee.

The progress certificates upon which the payments were made, being issued by an officer appointed by the railway company, were such as were provided for by the mortgage-deed and the by-laws; the certificates of an engineer appointed with the concurrence of the municipal corporations, or of an inspecting engineer appointed by the Ontario Railway and Municipal Board under sec. 162 of the Ontario Railway Act, 1906, were not called for or contemplated.

The trustee was justified in paying to the railway company, out of the proceeds of the guaranteed bonds, two-thirds of 90 per cent. of the "face value" of the certificates, although none of the unguaranteed bonds had been sold.

Per MEREDITH, C.J.O., and FERGUSON, J.A.:—Even if the trustee was wrong in accepting certificates signed by the chief engineer, and in paying out the proceeds of the guaranteed bonds, including the 10 per cent., to the railway company, the trustee was protected from liability by provisions in the mortgage-deed to the effect that the trustee was not to be made responsible for any error or mistake made by it in good faith, nor was it to incur any

1917-18
 STOTHERS
 v.
 TORONTO
 GENERAL
 TRUSTS
 CORPORATION.

liability or responsibility except for wilful breach of the trusts created by the deed; and, if not so protected, it should, having acted honestly and reasonably, be relieved from liability under the provisions of sec. 37 of the Trustee Act, R.S.O. 1914, ch. 121, or, if necessary, the trustee might rely on the provisions of sec. 66 of that Act, treating the order made by Middleton, J., as made under that section.

Per MEREDITH, C.J.O.:—The claim of the plaintiffs was barred by the Limitations Act, R.S.O. 1914, ch. 75, sec. 47, as to all sums paid to the railway company more than 6 years before the commencement of this action.

Per MEREDITH, C.J.O., and HODGINS, J.A.:—A claim made by the plaintiff in regard to interest on the proceeds of the sale of the unguaranteed bonds, was unfounded.

Per HODGINS, J.A.:—The proper meaning of clause 3 of the mortgage-deed was that the proceeds of the guaranteed bonds, that is, the money derived from them, should be paid out only *pro ratâ* with the proceeds of the unguaranteed bonds, that is, the money derived from them. The trustee was not justified in assuming that the moneys required for the construction of the railway, and to be advanced proportionately with that to be derived from another source, could be validly expended in the proportion indicated, when as a matter of fact there were no other moneys to settle what that proportion was. While the certificates as to the value of the services and materials might state their value at 100 per cent., the progress certificates must not exceed 90 per cent. thereof, and that 90 per cent. was to be paid on the *pro ratâ* basis, partly from the guaranteed and partly from the unguaranteed bonds, so that there should be always in hand a balance of 10 per cent. on the value of the services and materials as certified to. The meaning given to clause 3 by the order of MIDDLETON, J., was, therefore, not the true one.

But the order, if there was jurisdiction to make it, and if it bound all the plaintiffs, was an answer to their claim in this action. There was no jurisdiction under Rule 938 to make the last part of the order, validating payments which had been theretofore made by the trustee. The other parts of the order might properly be made under Rule 938, the railway company occupying the position of *cestui que trust* under the mortgage-deed, or that part of it which dealt with the payment out of moneys received from the sale of the bonds for which the mortgage was the security, and then remaining in the hands of the trustee. The municipal corporations had an interest under the mortgage-deed, there being a provision for their benefit in clause 3, an acceptance of the trusts by the trustee, and an agreement to exercise the powers and duties set out in the deed to the best of its ability. Therefore the order was binding upon those municipal corporations which were actually or legally represented before the Court in regard to those questions which could properly arise upon the motion made, provided that the order rested upon a proper foundation.

As to the effect of the alleged absence of a notice of motion, it was not shewn that no notice of motion was served upon any one, and the maxim *Omnia præsumuntur rite esse acta* should be acted upon (though, *semble*, a notice of motion is necessary for the institution of a proceeding under Rule 938).

The most important question arising in the action, that regarding the method of payment adopted by the trustee, was not originally before MIDDLETON, J., it having been raised for the first time in the written argument put in by the solicitor for the corporation of G.; as to that question no representation order was made; and the order, as to that question, though it bound the corporations of A. and G., did not bind the other two corporations. But in any case, neither Rule 200 nor Rule 193 applied, and the order directing representation could not be treated as meaning something else. The part of the order dealing with the important question was without legal foundation, and the two corporations not represented were not bound by it.

The trustee acted in good faith, but ignoring the plain words of the trust was not to be classed as an error or mistake which good faith condoned, and therefore it was not absolved by the provisions of the mortgage-deed; nor was it relieved under sec. 37 of the Trustee Act, for it could not be said that it acted reasonably. As to sec. 66, so far as the trustee acted under the order after it was made, the order was a protection, but advice under that section could not have a retrospective effect.

The appeal should be allowed as to the claims of the two corporations not bound by the order, and they should recover from the trustee the damage sustained by reason of the course pursued by the trustee.

1917
STOTHERS
v.
TORONTO
GENERAL
TRUSTS
CORPORATION.

ACTION by Thomas Stothers, in whom the assets of the Ontario West Shore Railway Company were vested by statute, and the Municipal Corporations of the Town of Goderich, the Town of Kincardine, the Township of Ashfield, and the Township of Huron, for an account of the moneys received and paid out by the defendant trust corporation in connection with the railway, and for payment to the plaintiffs of any money improperly paid out, and for interest, and for delivery up of bonds.

June 18, 1917. The action was tried by SUTHERLAND, J., without a jury, at a Toronto sittings.

E. D. Armour, K.C., *William Proudfoot*, K.C., and *C. Garrow*, for the plaintiffs.

I. F. Hellmuth, K.C., and *E. G. Long*, for the defendant corporation.

December 15, 1917. SUTHERLAND, J.:—In and prior to the year 1908, one John W. Moyes promoted a line of railway between the towns of Goderich and Kincardine through the townships of Ashfield and Huron, and applied to all four of the said municipalities for financial assistance, which they agreed to furnish by guaranteeing the payment of certain bonds issued by the railway company to the extent of \$400,000, and the said bonds were so issued by the company and guaranteed by the municipalities.

Additional bonds not guaranteed by the municipalities were issued to the extent of \$200,000. Under an agreement between the railway company and the municipalities, the bonds were to be secured by a mortgage to a trustee on the roadbed and assets of the railway company, and the defendant corporation was appointed and accepted the position of trustee, the mortgage being executed to it by the railway company on the 1st May, 1908.

The by-laws passed by the municipalities and the agreements between them and the railway company are set out in (1908) 8 Edw. VII. ch. 135, intituled an Act respecting the Ontario West Shore Electric Railway Company.

Sutherland, J.

1917

STOTHERS

v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

By (1906) 6 Edw. VII. ch. 113, the time for the commencement of the said railway had been extended.

By (1909) 9 Edw. VII. ch. 139, the name of the company was changed to the Ontario West Shore Railway Company, and the mortgage-deed was approved and confirmed and the bonds authorised to be issued as therein mentioned declared to be valid and binding, and a copy of the said mortgage is set out in schedule A to the Act.

Clause 3 of the respective by-laws of the plaintiff municipal corporations is as follows:—

“As a condition of executing the said guarantee all moneys, proceeds of the sale or pledge of any of the said bonds or debentures to be guaranteed by virtue of the by-law, shall be paid to the said trustee, or the bonds themselves shall be deposited with the said trustee, and shall be applicable only for the purposes of the said railway *pro ratâ* with the proceeds of the sale or pledge of the other bonds so to be issued as aforesaid, and shall be paid out by the said trustee only as he receives progress certificates, and no amount shall be paid thereout except to the extent of the face value of such progress certificates, which are to be issued for amounts from time to time, not exceeding 90 per cent. of such services or materials as are certified by the engineer appointed to inspect the said works and *pro ratâ* as aforesaid, and the balance shall be paid out only after the completion of the said railway and the opening of the same authorised by the Ontario Railway and Municipal Board, in accordance with the provisions of section 163 of the Ontario Railway and Municipal Board Act, 1906.”

And by clause 14 of the mortgage given by the railway company to the defendant, it is covenanted and agreed “that the trusts created by this instrument are accepted upon the express conditions that the said trustee shall not incur any liability or responsibility whatever in consequence of permitting or suffering the party of the first part to retain or be in possession of the estate and premises hereby mortgaged, or agreed or intended so to be; nor shall said trustee be liable for any depreciation or deterioration, loss or injury which may be done or occur to the premises herein mortgaged nor for any other account, matter, or thing other than the wilful breach of the party of the second part hereto of the trusts hereby created.”

Other clauses are as follows:—

“The trustee shall not be responsible for any error or mistake made by it in good faith. The trustee shall not be compelled to take any action as trustee under this mortgage unless first properly indemnified to its full satisfaction, nor shall it be chargeable with notice of any default on the part of the company except upon delivery to it of a distinct notification in writing of such default by some person or persons interested in the trust whose interest, if the trustee shall require, must be proved to the reasonable satisfaction of the trustee.

“In case at any time it shall be necessary and proper for the trustee to make any investigation respecting any fact or facts preparatory to taking or refraining from taking any action, or doing or not doing anything as such trustee, the certificate of the company under its corporate seal attested by the signature of its president or secretary or the affidavit or statutory declaration of one or more directors shall be conclusive evidence of such facts to protect the trustee in any action or position that it may take or assume by reason of the supposed existence of such facts.

“The trustee shall be protected in acting upon any resolution, notice, request, consent, certificate, affidavit, declaration, voucher, bond or other paper or document believed by it to be genuine and to have been passed or signed by the proper party.”

The plaintiffs allege in their statement of claim as follows:—

“(3) Under the agreement between said railway company and said municipalities all said bonds were to be secured by a mortgage to a trustee on the roadbed and all assets of said railway company as in said mortgage mentioned, and the defendant was appointed and accepted the position of trustee, and on or about the 1st day of May, A.D. 1908, such mortgage was executed by said railway company to said defendant, to which said mortgage plaintiffs crave leave to refer on the trial hereof.

“(4) Under the terms and conditions of said agreement between said railway company and said municipalities and of the by-laws passed by the plaintiff municipalities, the said bonds were to be issued by said trustee only upon the filing with said trustee of a certificate of the secretary of said railway (verified by affidavit or declaration of the president thereof) shewing the number of miles of single track constructed or under contract to

Sutherland, J.

1917

STOTHERS
v.
TORONTO
GENERAL
TRUSTS
CORPORATION.

Sutherland, J.

1917

STOTHERS

v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

be constructed, and upon the filing of such certificate the trustee was authorised to issue bonds to the extent of \$15,000 per mile of single track covered by such certificate.

"(5) That all moneys realised from the sale or pledge of all said bonds so guaranteed by said municipalities were to be paid to said trustee and were to be payable by it only for the purposes of said railway and *pro ratâ* with the proceeds of the sale of the other bonds issued as aforesaid and upon progress certificates which were to be issued from time to time for 90 per cent. of such services or materials as were certified to by the engineer appointed to inspect the said works, and *pro ratâ* as aforesaid.

"(5a) The balance of 10 per cent. over and above the 90 per cent. referred to in the preceding paragraph was, according to the provisions of the said by-laws, payable only after the completion of the said railway and the opening of the same as authorised by the Ontario Railway and Municipal Board in accordance with the provisions of section 163 of the Ontario Railway Act, 1906. The said railway was not completed nor was the opening of same authorised by said Board, and said 10 per cent. was not payable, yet, in breach of its duty as said trustee, the defendant improperly paid out the said 10 per cent., and is, the plaintiffs contend, now liable to make good the same.

"(6) That bonds to the amount of \$15,000 per mile, aggregating \$600,000, were issued and certified by said defendant under the provisions of said trust mortgage, and \$400,000 of said bonds so guaranteed by said municipalities were sold for \$384,000, which amount was paid to and received by said defendant under the trusts aforesaid.

"(7) That no part of said railway was constructed, and no contract for the construction thereof was entered into, and no proper or legal certificate was obtained by the defendant, as required by said trust mortgage, before such bonds were issued or certified by said defendant, and said defendant wrongfully and improperly issued said bonds.

"(8) That said moneys so received from the sale of said bonds were wrongfully and illegally paid out by said defendant without obtaining the certificate of the engineer, as required by said by-laws.

“(9) The defendant as such trustee was to pay out the proceeds of said guaranteed bonds so sold only for services and materials furnished in such construction work, and *pro ratâ* with payments made therefor by the railway company, and it was the duty of the defendant as such trustee to see that such proceeds were so applied and in that proportion; but the defendant, in neglect of its said duty, paid out the whole of the proceeds of said guaranteed bonds without seeing that the proportionate part was paid by said railway company, and said railway company paid nothing on account of the cost of such services and materials, but the whole cost thereof was paid from said guaranteed bonds.

“(10) Upon the sale of said guaranteed bonds the proceeds thereof, \$384,000, were paid to said defendant and deposited with it, and said defendant agreed to allow interest on any portion of said moneys while on deposit with it.

“(11) The interest on said moneys as aforesaid deposited amounted to about the sum of \$18,000, which sum was allowed by said defendant, but the defendant wrongfully and illegally paid away the whole amount of said interest.”

On the 7th April, 1908, the Ontario West Shore Electric Railway Company passed a resolution to the effect that the appointment by it “of an engineer to inspect the works of the company and to issue progress certificates in respect of services and materials done and provided from time to time for and in the construction of the company’s line of railway be left to the president of the company, and that the president of the company is hereby authorised to make the said appointment;” and on the 18th July, 1908, under his hand as president and the seal of the company, John W. Moyes issued a written certificate, to which was attached a copy of the said resolution, to the effect that, in pursuance thereof, he, “as president of the said company, appointed Vaughan M. Roberts engineer for the said purposes, and the said Vaughan M. Roberts has accepted the said appointment and undertaken the duties thereof and is now acting thereunder.”

On the 20th July the railway company delivered to the defendant a certified copy of a resolution of the directors of the company authorising the president to sell and dispose of the guaranteed bonds at a price not lower than 95 cents on the dollar.

On the 17th April following, Vaughan M. Roberts submitted

Sutherland, J.

1917

STOTHERS

v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Sutherland, J.

1917

STOTHERS

v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

a proposition in writing to John W. Moyes, the president of the company, as follows:—

“I hereby agree to make all surveys, plans, and profiles of the Ontario West Shore Electric Railway, from Goderich to Kincardine, in accordance with the provisions of the Ontario Railway Act, and to lay out all work ahead of construction for \$7.50 per day, exclusive of all expenses contingent upon the work, such as livery when necessary, stakes, personal expenses away from home, wages, and expenses of staff, drafting material, note-books, &c., all original plans, field-notes, &c., to be the property of the Ontario West Shore Electric Railway Company.”

The work of construction proceeded under the supervision of Roberts, and from time to time he issued progress certificates. The form at first proposed to be used by Moyes and Roberts, on being submitted to the defendant company, was referred by it to its solicitor, who revised the form of the progress certificates, and as so revised the certificates were thereafter issued by Roberts in the following form:—

“I, V. M. Roberts, Chief Engineer of the Ontario West Shore Electric Railway Company, hereby certify that for and in the construction of the line of railway of the above company from Goderich to Kincardine the materials and services already provided and done are—

90 per cent. thereof amounts to

Deduct amount previously certified

Balance for which this certificate is given

“And I certify that the said company has fulfilled the terms and conditions necessary to be fulfilled under by-law No. 49, 1907, of the Town of Goderich, by-law No. 532 of the Town of Kincardine, by-law No. 371, 1907, of the Township of Huron, and by-law No. VIII. of the Township of Ashfield, to entitle the said company to receive from the Toronto General Trusts Corporation the said sum of \$—

“(Signed) _____,

“Chief Engineer.”

On the 10th July, 1908, Roberts made a statutory declaration as follows:—

“That I am the Chief Engineer of the Ontario West Shore Electric Railway; that surveys have been made under my direc-

tion and supervision of that portion of the said railway lying between and including the towns of Goderich and Kincardine, and I find and report that the length of track between the two said towns, including branches and that portion of the said railway within the said towns, is forty miles (40) and two-tenths ($\frac{2}{10}$) of a mile."

On the 20th July, 1908, H. J. A. McKeown, a solicitor practising at the town of Goderich, and acting as secretary of the Ontario West Shore Electric Railway Company, issued a certificate under the seal of the company to the following effect, "that the number of miles of single track of the line of railway of the Ontario West Shore Electric Railway constructed or under contract to be constructed, being the line from Goderich to Kincardine, is a fraction over 40 miles." And Moyes, as president, made a statutory declaration, to which the said certificate was attached, stating "that attached hereto is the certificate of the secretary of the Ontario West Shore Electric Railway Company, that the number of miles of single track of the said company's line of railway constructed or under contract to be constructed, being the line from Goderich to Kincardine, is a fraction over 40 miles, and I do solemnly declare that the said certificate and the statements therein contained are correct."

On the 23rd July, 1908, John W. Moyes, as president of the railway company, wrote a letter to the managing director of the defendant corporation as follows:—

"Herewith I beg to hand you twenty (20) \$1,000.00 bonds (Nos. 581 to 600 each inclusive) of the Ontario West Shore Electric Railway Company, to be held by you on our behalf until the certificate of the Ontario Railway and Municipal Board shall be issued, when you will, on demand of the contractor, accompanied by the certificate of our engineer, deliver these bonds or their proceeds (if sold) to the said contractor, in satisfaction of the *pro ratâ* share of the company's share of the ten (10) per cent. deducted from the engineer's progress certificates issued to the contractor during construction of the company's line from Goderich to Kincardine.

"This does not, of course, refer to the *pro ratâ* share of the guaranteed bonds or their proceeds to be withheld by you for the same purpose, and it is expressly understood and agreed to by

Sutherland, J.

1917

STOTHERS

v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Sutherland, J.

1917

STOTHERS

v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

you that these bonds (or their proceeds if sold) now delivered to you are to be used or held for no other purpose than as above set out."

And therewith handed to him the 20 bonds referred to.

On the 20th November, 1908, Messrs. Dickinson & Garrow wrote to the defendant corporation as follows:—

"You are the trustee in this matter for the bondholders of the above company and for the several municipalities who have guaranteed the payment of certain of the bonds. The Town of Goderich, as well as the other municipalities concerned, are getting a little anxious about the manner in which construction work is being dealt with, and the town has asked us to get some information from yourselves upon the subject.

"We have not a copy of the mortgage before us, but we understand that the proceeds of the bonds, which are to be applied in construction work, are to be applied ratably from the unguaranteed bonds, as well as those guaranteed by the municipalities. The municipalities do not know what the position is, and are impressed with the idea that no bonds have been sold, other than those that have been guaranteed, and that the construction work is being paid for entirely out of the proceeds of these latter bonds. Would you be good enough to inform us what bonds have been sold and if there is anything in their fears in that regard?

"There was a verbal agreement with Mr. Moyes that the progress certificates should be deposited here, or at least copies of them, with the Bank of Commerce, for inspection by the various municipalities concerned, so that they could keep in touch with the progress of the work, but this is not being done, and they are to that extent in the dark.

"Some of the municipalities consider that they should also have an independent engineer to inspect and check over the construction work. We presume that if they agree upon this you would have no objection to that course being taken."

A reply was, on the 25th November, 1908, sent by the defendant corporation to Messrs. Dickinson & Garrow as follows:—

"I beg to acknowledge receipt of your letter of 20th inst. and note that the Town of Goderich desires certain information in regard to construction in connection with the above railway company.

"This corporation, as you are of course aware, is acting as trustee under trust-deed dated May 1st, 1908. Our duties are confined strictly to the terms of the said mortgage, clause 3 of which provides that: 'As to certain of the bonds hereby secured, which have been or may hereafter be guaranteed by certain municipalities in the said counties or some of them, it is hereby stipulated and agreed, for the purpose of securing the said municipalities, as follows:—All moneys, proceeds of the sale or pledge of any of the said bonds so guaranteed, shall be paid to the said trustee, or the said bonds themselves shall be deposited with the said trustee, and shall be applicable only for the purposes of the said railway *pro ratâ* with the proceeds of the sale or pledge of the other bonds issued as aforesaid, and shall be paid out by the said trustee only as it receives progress certificates, and no amount shall be paid thereout except to the extent of the face value of such progress certificates, which are to be issued for amounts from time to time not exceeding 90 per cent. of such services or materials as are certified to by the engineer appointed to inspect the said works, and *pro ratâ* as aforesaid; and the balance shall be paid out only after the completion of the said railway and the opening of the same (or the section thereof in respect of which such progress certificates have been issued) authorised by the Ontario Railway and Municipal Board in accordance with the provisions of section 163 of the Ontario Railway Act, 1906. Any delivery of bonds to be made by the trustee to the company hereunder shall be sufficiently made by delivery thereof to the president or secretary of the company.'

"The guaranteed bonds have been deposited with this corporation, and some have been sold and the proceeds of same deposited to the credit of the Ontario West Shore Railway Company. These moneys are paid to the Ontario West Shore Railway Company upon receiving progress certificates signed by the engineer, Mr. Vaughan M. Roberts, who was appointed by Mr. Moyes, the president of the company, under authority of his directors, to inspect the works of the company. We only pay, however, to the company $66\frac{2}{3}$ per cent. of the amount of such certificates, being the *pro ratâ* share of the guaranteed bonds.

"We trust this letter will give you the desired information."

The defendant corporation had been issuing cheques to the

Sutherland, J.

1917

STOTHERS

v. The

TORONTO

GENERAL

TRUSTS

CORPORATION.

Sutherland, J.

1917

STOTHERS

v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

railway company for two-thirds of the amount certified in each case, treating that as the *pro ratâ* share of the total issue of bonds as between the guaranteed and unguaranteed bonds. They made no inquiry, before issuing the cheques, to ascertain whether the proportional amount was being paid out on the unguaranteed bonds. They did not inquire or ascertain whether the unguaranteed bonds had been sold or not. Throughout, the defendant corporation's officials testified that they accepted and acted upon the documents produced, hereinbefore referred to, in good faith and believing that they were genuine and that the statements therein contained were true and correct, and throughout took the advice of their solicitors and acted upon it.

On the 10th May, 1909, Mr. Garrow wrote to the defendant corporation as follows:—

“Acting on behalf of the Town of Goderich, I am instructed to write you for information regarding the construction of the Ontario West Shore Electric Railway. The council has from time to time asked Mr. Moyes to let them see the progress certificates upon which payments have been made, and I understand this has been promised, but so far has never been done. The corporation think that they should not be left so absolutely in the dark in regard to the matter as they have been heretofore.

“Under clause 3 of the guaranteeing by-law, the moneys are to be paid out on progress certificates of the engineer appointed to inspect the said works, and the corporation would like to know whether there is an independent engineer for that purpose, or whether the progress certificates are those of the engineer of the railway company.

“As I have only recently had anything to do with this matter, I should consider it a favour if you would write me as fully as possible setting out the whole situation. The corporation of course does not suggest that anything is wrong, but it feels that it should be in a position to know exactly what is going on.”

On the 13th May, 1909, a reply was sent to him from the defendant company as follows:—

“Your letter of the 10th inst. asking for certain information in regard to the above railway company duly received.

“I beg to enclose for your inspection a copy of the form of progress certificates which are filed by the chief engineer of the

railway company. We also send a memorandum shewing the amounts charged against the Town of Goderich account in our ledger, being the town's *pro rata* share of the $66\frac{2}{3}$ per cent. of the various progress certificates.

"The form of the progress certificates, I think you will find, is in accordance with schedule A (section 79) of the Ontario Railway Act, 58 Vict. ch. 38, also the last Electric Railway Act, 6 Edw. VII. ch. 30, sec. 145 and schedule A.

"This corporation, I might say, is merely acting as trustee under terms of the mortgage deed of trust, and if there is any other information we can give you in connection with our duties as such trustee, we shall be pleased to do so."

In the spring of 1911, the railway company applied, through its president, to the defendant corporation, to pay the balance of the moneys then in its hands. The defendant corporation was reluctant to do so without the protection of an order of the Court. In consequence of this attitude on its part, a motion came on, under Con. Rule 938, before Middleton, J., to determine certain questions arising under the said debenture mortgage. Upon the motion the railway company and the defendant corporation were represented by counsel, and Mr. Proudfoot, K.C., appeared for the Township of Ashfield; and upon the argument the said Judge appointed that township to represent all the guaranteeing municipalities, with the exception of the Town of Goderich, for whom Mr. Garrow put in a written argument, adopting the argument made on behalf of the other municipalities by Mr. Proudfoot, as to the right of the trusts corporation to retain in its hands a portion of the proceeds of the guaranteeing bonds until completion of the railway. In the said argument he expressly took exception to the method of payment by the defendant corporation pursuant to the said progress certificates. I quote from the judgment of Middleton, J., delivered on the 13th April, 1911, *Re Ontario and West Shore R.W. Co.*, 2 O.W.N. 1041, at pp. 1042, 1043:—

"The construction of the railway is likely to cost more than \$600,000, and the question arises whether the railway, on producing progress certificates shewing that work had been done, 90 per cent. of which exceeds \$600,000, are entitled to demand the whole \$400,000 from the trust company. The balance that is to be paid over is the balance, if any, remaining after the line is com-

Sutherland, J.

1917

STOTHERS

v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Sutherland, J.

1917

STOTHERS

v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

pleted. The only thing that has been stipulated for by way of protection of the guaranteeing municipalities is the production of progress certificates shewing the value of the work done. I cannot read into the agreement a right to retain a sum of money until the road is completed. If the road can be built for less than the \$600,000, then the balance is a security, as it is not to be paid until the road is completed. The letter of the bond must govern and I cannot make a new agreement for the parties. Both parties seem to have taken the risk of the available funds being sufficient to complete the building of the line, and the agreement makes no provision for the retention of such a sum as may be necessary to complete the line, and it would have been quite impracticable to devise any workable agreement to that effect.

"The other question is as to the engineer to certify. The agreement speaks of 'the engineer appointed to inspect the said works.' Section 145 of the Ontario Railway Act shews this to be 'the chief engineer of the railway.' Apart from this the progress certificates granted by the engineer in charge of the supervision of the work for the railway are intended to govern.

"Costs as arranged between the parties.

"Since the argument of the two questions already dealt with, a third question has been raised by Mr. Garrow as set out in his memorandum.

"I think Mr. Smoke in his memorandum successfully answers this contention. It may well be that the payment should be *pro ratâ* with the proceeds of the bonds of both classes. But if so, the guaranteed bonds would bring more than the bonds without guarantee, and the result would be less favourable to the municipalities than that which the railway is prepared to accept. I cannot think that the proceeds of the guaranteed issue is to be compared with the face value of the unguaranteed bonds, and this is not stipulated."

The judgment of Middleton, J., as formally issued, is as follows:—

"Upon motion made unto this Court on the 31st day of March, 1911, by counsel on behalf of the Ontario West Shore Railway Company (formerly the Ontario West Shore Electric Railway Company) in respect of the trusts of the mortgage made by the Ontario West Shore Electric Railway Company to the Toronto

General Trusts Corporation, dated the 1st day of May, 1908, to secure the bonds of the said company as in the said mortgage set out, and this Court having ordered that the Township of Ashfield do represent for the purposes of the said application the Township of Huron and the Town of Kincardine, and upon hearing read the affidavit of John Wilkie Moyes filed and the exhibits therein referred to, and upon hearing counsel for the Ontario West Shore Railway Company, the Toronto General Trusts Corporation, the Town of Goderich, and the Township of Ashfield, representing also the Township of Huron and the Town of Kincardine, and after reserving judgment until this day:—

“1. This Court doth declare that, upon the Toronto General Trusts Corporation, trustee under the said mortgage, receiving from time to time progress certificates of the chief engineer of the said railway company, in the form filed herein, certifying to 90 per cent. of the value of services and materials done or supplied in the construction of the said railway to the date of such certificates, it is the duty of the said the Toronto General Trusts Corporation, in every such case, to pay to the said railway company out of the moneys in its hands, proceeds of the sale of the guaranteed bonds in the third paragraph of the said mortgage mentioned, two-thirds of the said 90 per cent. set out in such progress certificates so issued and delivered to the said corporation, and that it is the duty of the said Toronto General Trusts Corporation to make payments from time to time, notwithstanding that the said moneys in its hands, proceeds of the sale of the said guaranteed bonds, may, by payments made in accordance with such certificates, be wholly exhausted before the completion and opening of the said line of railway; and that all payments heretofore made by the said the Toronto General Trusts Corporation to the extent of two-thirds of 90 per cent. of the amount set out in the certificates of the said engineer, issued and delivered to it, have been properly made by the said the Toronto General Trusts Corporation in accordance with the terms of the said mortgage, and doth order and adjudge the same accordingly.

“2. And this Court doth order and adjudge that the said the Toronto General Trusts Corporation do make payment accordingly out of the said proceeds and to the extent only of the said proceeds in its hands from time to time.”

Sutherland, J.

1917

STOTHERS

v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Sutherland, J.

1917

STOTHERS

v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

It appears to be obvious, upon the evidence adduced at the trial, that the order so made came to the knowledge of the plaintiff municipalities.

By an Act of the Legislature of the Province of Ontario, being 3 Geo. V. ch. 135, the charter and all assets of the said Ontario West Shore Railway Company were vested in the plaintiff Thomas Stothers as trustee for the said plaintiff municipalities.

In this action the plaintiffs assert that, by reason of the payments of the moneys being made without proper authority and in excess of the *pro ratâ* amount authorised, a large portion of the moneys was not applied in the construction of the railway, was lost to the plaintiffs, and the railway was not completed; that the plaintiff municipalities as guarantors have been compelled to pay large amounts on account thereof and are still liable for the balance thereof, and they therefore claim:—

“1. An account of all moneys received and paid out by said defendant as such trustee in connection with said West Shore Railway and payment to plaintiffs of any and all moneys improperly paid out by said defendant.

“2. An account of and payment to plaintiffs of all interest allowed upon said moneys so deposited with the defendant.

“3. Delivery to plaintiffs and cancellation of the \$20,000 or other amount of bonds of said railway deposited with or handed to said defendant by said John W. Moyes, and of any bonds of said railway now in their possession or control.

“4. Such other relief as the plaintiffs may appear entitled to.

“5. The costs of this action.”

The defendant corporation pleads as follows:—

“8. Pursuant to the terms of said mortgage, the defendant from time to time, on the receipt of said progress certificates, signed by said engineer, paid out to the said railway company two-thirds of 90 per cent. of the amount of money shewn and certified by the said respective progress certificates. Pursuant to the said progress certificates, the said trustee disbursed, out of the moneys received from the sale of guaranteed bonds, and according to the said method of computation, the sum of \$383,969.94, leaving a balance in their hands of \$30.06. No payments were made by the defendant except on progress certificates signed by the engineer of said railway company, as required by said mortgage.

"9. During the course of construction of the said railway, and after the defendant had paid out the sum of \$344,565.32 from proceeds of sale of guaranteed bonds, pursuant to progress certificates of said engineer, certain questions were raised by the plaintiffs other than the plaintiff Stothers as to the legality of the payments made by the said defendant under said progress certificates, and the method of computing the amounts which the said railway company should receive in respect of such certificates, including the question as to payment of the balance of 10 per cent. over and above the 90 per cent. of the amounts set out in the progress certificates above mentioned and which said balance was in the hands of the defendant at the date of the judgment of Mr. Justice Middleton hereinafter referred to. For the purpose of settling such dispute, proceedings were taken in this Court, to which the said railway company, the plaintiffs, other than the plaintiff Stothers, and the defendant were parties, and by judgment pronounced by Mr. Justice Middleton on the 13th day of April, 1913, the payments made by the defendant, and its said method of computing the amount of each payment under said progress certificates, were approved, and it was declared in said judgment that it was the duty of the defendant to make payments in pursuance of the said progress certificates, notwithstanding that such payments would wholly exhaust the moneys in the defendant's hands before the completion and opening of the said railway. The defendant says that all questions as to payment made by it are finally determined by the said judgment, and the plaintiffs are estopped from raising any objection thereto.

"10. The said mortgage contained no provision in regard to interest on moneys received by the defendant in respect of the proceeds of the sale of any bonds of the said railway company or otherwise, nor was the defendant under any obligation to allow or pay any interest on moneys received from or on behalf of the said company. By agreement made on or about the 23rd day of July, 1908, between the defendant and the said railway company, through its president, and amended by an agreement of the 30th December, 1908, made between the same parties, the defendant agreed to allow the said railway company interest on its moneys while in the defendant's hands, on the terms and at the rates set out in said agreements; and, in pursuance of said

Sutherland, J.

1917

STOTHERS

v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Sutherland, J.

1917

STOTHERS

v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

agreements, the defendant allowed and paid the said company from time to time an aggregate of \$18,867.64, and the said interest paid by the defendant to the said railway company was applied by the said railway company in paying interest on the said guaranteed bonds, which had been issued and sold by the said company.

"11. The defendant was not a party to any agreement referred to in paragraph 3 of the statement of claim, and the defendant says that it has in all respects carried out its duties as trustee and fulfilled its obligations under the said mortgage and agreements; that all documents furnished to it and on which it acted were received by it in good faith and were reasonably and honestly believed by it to be genuine, and by the terms of said mortgage it is protected in acting upon such documents.

"12. The defendant says that it has never been guilty of any wilful breach of any trust created by said mortgage, nor of any bad faith, gross negligence, or wilful default, and that it has never done or omitted any act, matter, or thing which would render it liable under the terms of said mortgage, and the defendant pleads and claims the benefit of the trustee protection clauses in said mortgage, and also pleads and claims the benefit of the Trustee Act, being R.S.O. 1914, ch. 121.

"13. The defendant further says that the plaintiffs other than the plaintiff Stothers have no claim or right in respect of the interest allowed and paid by the defendant to the said railway company, and that the plaintiff Stothers, except as to the sum of \$317.96, balance in respect of said interest, has no claim, as the said railway company, which he now represents, received and accepted all moneys paid by the defendant in respect of interest, except the said sum of \$317.96, and the said plaintiff is estopped from making any claim in respect thereof. If the said plaintiffs ever had any claim or right in respect of said interest, which the defendant does not admit but denies, the defendant says that all interest paid by it was applied by the said railway company in paying interest on said bonds guaranteed by the plaintiffs other than the plaintiff Stothers, and that such payments were in ease of such plaintiffs, and that the plaintiffs have suffered no loss or damage in respect of any payments of interest made by the defendant.

"14. On or about the 23rd day of July, 1908, the defendant

received from the president of said railway company 20 unguaranteed bonds of \$1,000 each, numbered 581 to 600, both inclusive. The defendant has no personal interest in said bonds, and has always been and is now ready and willing to deliver them to the party lawfully entitled to receive the same, but has retained said bonds pursuant to the order or direction of the Ontario Railway and Municipal Board, made at the time said Board was investigating the affairs of said railway company, requiring the defendant to hold said bonds till the true ownership thereof should be determined, and the defendant is ready and willing to deposit the said bonds, if required, with the Accountant of this Court. Save and except the said unguaranteed bonds numbered 581 to 600 inclusive, and the said sum of \$30.06, and the said sum of \$317.96, which said sums the defendant is ready and willing to pay over or pay into Court as may be desired or ordered, the defendant has no money, property, or assets of the said railway company in its possession or under its control."

In reply the plaintiffs allege that the inspecting engineer required to be appointed by the said trust-deed was not an engineer to be appointed as alleged by the defendant, and that Roberts was not appointed and did not act as engineer of the railway company or as such inspecting engineer, but, if appointed at all, was the engineer of a company known as the Huron Construction Company, by which he was paid, and as such had no power to issue the certificates referred to.

A further contention put forward in the said reply was that the order made by Middleton, J., was so made without jurisdiction, and, if made with jurisdiction, was procured to be made by untrue and unfounded representations made by John W. Moyes in his affidavit filed on the motion.

It seems to me that, in so far as the matter of most importance in this action is concerned, namely, the payments made by the defendant under the authority of the engineer's certificates, what I am in effect asked to do is to hear and determine an appeal from the order of my brother Middleton. This I do not think it is open for me to do. If, therefore, I am compelled, as I think I am, to assume that the order was rightly made, then the matter of the said payments is *res adjudicata*, as pleaded and contended by the defendant.

Sutherland, J.

1917

STOTHERS

v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Sutherland, J.

1917

STOTHERS

v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Upon the evidence, it would be impossible for me to find the defendant guilty of any wilful breach of the trusts imposed upon it by the terms of the deed. Anything done by it was apparently done in good faith and in reliance upon the certificates and other documents referred to and the truthfulness and accuracy of the statements therein contained.

As to the item of \$18,000 and upwards, being the interest upon the proceeds of the sale of bonds received by the defendant, it appears from the evidence to be the fact, as alleged by the defendant, that no clause is contained in the mortgage by which provision is made therefor, and that, in pursuance of the agreements made between the railway company and the defendant, the latter allowed and paid to the company from time to time interest at rates agreed upon, which interest was applied by the company in payment of interest on the guaranteed bonds issued and sold by the company. The railway company got the benefit of this interest; it went in ease of its obligations; and I do not think the plaintiffs are in a position now to question the transaction or ask repayment. All of the said interest received by the defendant, with the exception of \$317.96, was so paid out as aforesaid, leaving that amount still in the defendant's hands. All of the moneys received by the defendant on account of the proceeds of the sale of guaranteed bonds has been paid out, with the exception of a small balance of \$30.06 still in its hands. It has also in its hands the \$20,000 of unguaranteed bonds hereinbefore referred to. There was substantially no controversy in this action over these three last mentioned matters, at all events after the filing of the statement of defence.

The plaintiff Thomas Stothers being now, as trustee for the said municipalities, entitled to receive the same, there will be judgment in his favour for delivery to him of the said unguaranteed bonds to the amount of \$20,000, and for the said sums of \$317.96 and \$30.06 respectively, with costs down to the filing of the statement of defence. The plaintiffs' action will otherwise be dismissed with costs subsequent to the filing of the defence.

The plaintiffs appealed from the judgment of SUTHERLAND, J.

October 30 and 31. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

E. D. Armour, K.C., *William Proudfoot*, K.C., *P. A. Malcolmson*, and *C. Garrow*, for the appellants, after referring to various statutes in connection with the incorporation of the Ontario West Shore Railway Company, the bonds issued by that company, and the by-laws of the municipal corporations guaranteeing the same, made special reference to the by-law of the Town of Goderich set out in 8 Edw. VII. ch. 135, as schedule A, the third clause of which, at p. 788 of the statute-book, enacts that, "as a condition of executing the said guarantee," the proceeds of the bonds to be guaranteed by virtue of the by-law shall only be applicable for the purposes of the railway *pro ratâ* with the proceeds of the other bonds, and shall be paid out by the trustee only as he receives progress certificates. It was submitted that these provisions for the protection of the municipality had not been complied with. It was further argued that the order of Middleton, J., in *Re Ontario and West Shore R.W. Co.*, 2 O.W.N. 1041, was made without jurisdiction and was of no validity, having been made without notice to the parties interested. They referred to Rule 938 and Rules 200, 201, 202 of 1897, and to *McLeod v. Noble* (1897), 28 O.R. 528, 24 A.R. 459. The affidavit of Moyes, filed on the application to Middleton, J., is shewn to be a tissue of falsehoods, and as a matter of fact a large portion of the money paid over did not go into the construction of the railway at all. The Ontario Railway Act, 1906, secs. 130-145, was referred to, and it was argued that the constructing engineer could not be at the same time an inspecting engineer.

I. F. Hellmuth, K.C., and *E. T. Malone*, K.C., for the respondent, the defendant corporation, argued that the judgment of the trial Judge was correct in its view of the law and the facts, and that the order of Middleton, J., was valid and binding. The money was paid by the defendant corporation to the railway company, and it is not responsible for Moyes' act if he stole the money. The recital in the statute of 1909 (9 Edw. VII. ch. 139) shews that the mortgage securing the bonds was duly approved and confirmed, and in the mortgage-deed set out in schedule A, on p. 815 of the statute-book, the most ample provisions for the protection of the trustee are found. They referred to *Uffner v. Lewis* (1900), 27 A.R. 242, and to the Trustee Act, R.S.O. 1914, ch. 121, secs. 37 and 66, the application of which should relieve the defendant from liability.

App. Div.
1918STOTHERS
v.TORONTO
GENERAL
TRUSTS
CORPORATION.

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Armour, in reply, referred to *Forster v. Elvet Colliery Co.*, [1908] 1 K.B. 629, affirmed in *Dyson v. Forster*, [1909] A.C. 98; *In re Horsfall*, [1911] 2 Ch. 63, 69, 70; *In re Sugden's Trusts*, [1917] 1 Ch. 511, 517; Norton on Deeds (1906), p. 22, and the cases there cited of *Webb v. Spicer* (1849), 13 Q.B. 886; *Rex v. Houghton-le-Spring* (1819), 2 B. & Ald. 375. We are not bound by the mortgage, but can take advantage of anything in it that is in our favour. We never signed anything but a by-law, and we take our stand on that. As to the order of Middleton, J., we assert, not merely that it was made without jurisdiction, but that parties not duly served with notice of motion are not affected by it. This is a case of gross negligence on the part of the defendant, to which the Trustee Act does not apply.

December 20. MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from the judgment, dated the 15th December, 1917, which was directed to be entered by Sutherland, J., after the trial before him, sitting without a jury, at Toronto, on the previous 18th day of June.

The plaintiffs are Thomas Stothers, in whom the assets of the Ontario West Shore Railway Company were vested by statute, and the Municipal Corporations of the Town of Goderich, the Town of Kincardine, the Township of Ashfield, and the Township of Huron, and they sue for an account of the moneys received and paid out by the respondent in connection with the railway, and payment to the plaintiffs of any money improperly paid out by it; an account of and payment to the plaintiffs of all interest upon certain moneys alleged to have been deposited with the respondent; and delivery to the plaintiffs and cancellation "of the \$20,000 or other amount of bonds of the said railway deposited with or handed to the said defendant by said John W. Moyes, and of any bonds of the said railway now in its possession or control."

The railway company issued bonds secured on its railway to the amount of \$400,000, and these bonds were guaranteed by the municipal corporations who are plaintiffs, \$150,000 by Goderich, \$50,000 by Kincardine, \$125,000 by Ashfield, and \$75,000 by Huron, and bonds to the further amount of \$200,000 not so guaranteed.

Under the authority of by-laws of the councils of these corporations, the \$400,000 issue of bonds was guaranteed by the corporations.

These by-laws are set out in schedules to the Act 8 Edw. VII. ch. 135 (Ont.), and each of them contains a provision that, prior to the execution of the guarantee, the company shall execute and deliver to a trustee, to be agreed on by the company and the corporation, a mortgage on the property, assets, rents, and revenues of the company, present or future, or both, which should secure and provide for the payment of the principal and interest upon the bonds and for the repayment to the corporation of all moneys which may be paid by it on the guaranteed bonds *pro ratâ* with the other bonds to be issued by the company under the authority of its Act of incorporation and the amendments to it.

The by-laws also provide that all moneys, proceeds of the sale or pledge of any of the guaranteed bonds, shall be paid to the trustee, or the bonds themselves be deposited with the trustee, and shall be applicable only for the purposes of the railway *pro ratâ* with the proceeds of the sale or pledge of the other bonds, and shall be paid out by the trustee only as it receives progress certificates, and that no amount shall be paid out except to the extent of the "face value" of the certificates, which were to be issued for amounts from time to time not exceeding 90 per cent. of such services and materials as should be certified to by the engineer appointed to inspect the works, and *pro ratâ* as before mentioned, and that the balance should be paid out only after the completion of the railway and its opening, as authorised by the Ontario Railway and Municipal Board in accordance with the provisions of sec. 163 of the Ontario Railway and Municipal Board Act, 1906.

By the judgment in appeal the respondent was ordered to deliver to the appellant Stothers the 20 unguaranteed bonds and to pay to him the two sums of \$30.06 and \$317.96 which I shall afterwards mention; and, subject to that direction, the action was dismissed.

It is clear, I think, that the by-laws created no contractual relations between the corporations and the trustee; indeed, there was, when they were passed, no trustee. All that the by-laws created, if they created any contract, was a contract with the

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Mereditb,
C.J.O.

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Meredith,
C.J.O.

railway company to observe the conditions of the by-laws; and the only contract, in form a contract, that was entered into, was one by the railway company with each of the corporations to construct its line in the manner provided by the contracts. These contracts will be found in the schedules to the Act to which reference has been made.

The mortgage securing the bonds bears date the 1st day of May, 1908, and it was confirmed by 9 Edw. VII. ch. 139 (Ont.), and is set out in a schedule to the Act.

The parties to the mortgage are the company and the respondent, which had been named as the trustee.

By a clause numbered 3, it is provided that:—

“*Third.*—As to certain of the bonds hereby secured, which have been or may hereafter be guaranteed by certain municipalities in the said counties or some of them, it is hereby stipulated and agreed, for the purpose of securing the said municipalities, as follows:—All moneys, proceeds of the sale or pledge of any of the said bonds so guaranteed, shall be paid to the said trustee, or the said bonds themselves shall be deposited with the said trustee, and shall be applicable only for the purposes of the said railway *pro ratâ* with the proceeds of the sale or pledge of the other bonds issued as aforesaid, and shall be paid out by the said trustee only as it receives progress certificates, and no amount shall be paid thereout except to the extent of the face value of such progress certificates, which are to be issued for amounts from time to time not exceeding 90 per cent. of such services or materials as are certified to by the engineer appointed to inspect the said works, and *pro ratâ* as aforesaid: and the balance shall be paid out only after the completion of the said railway and the opening of the same (or the section thereof in respect of which such progress certificates have been issued) authorised by the Ontario Railway and Municipal Board, in accordance with the provisions of section 163 of the Ontario Railway Act, 1906. Any delivery of bonds to be made by the trustee to the company hereunder shall be sufficiently made by delivery thereof to the president or secretary of the company.”

The mortgage also provides that “the trustee shall not be responsible for any error or mistake made by it in good faith;” and that “the trusts created by this instrument are accepted upon

the express conditions that the said trustee shall not incur any liability or responsibility whatever in consequence . . . nor for any other account, matter or thing other than the wilful breach of the party of the second part hereto" (the trustee) "of the trusts hereby created."

These documents shew, I think, that it was contemplated that the railway company might itself sell the bonds, because, as I have said, each by-law contains a provision that the proceeds of the sale or pledge of the guaranteed bonds shall be paid to the trustee, which must mean, if the bonds were sold or pledged by the railway company.

It would appear that that course was not taken, but that the guaranteed bonds were delivered to the trustee, and were disposed of by it, and that the sum of \$384,000 was realised from the sale of them.

The whole proceeds of the sale, except \$30.06, were paid out by the trustee to the company on progress certificates signed by its chief engineer. The certificates are in the following form:—

"I, V. M. Roberts, Chief Engineer of the Ontario West Shore Electric Railway Company, hereby certify that for and in the construction of the line of railway of the above company from Goderich to Kincardine the materials and services already provided and done are—

"90 per cent. thereof amounts to

"Deduct amount previously certified

"Balance for which this certificate is given

"And I certify that the said company has fulfilled the terms and conditions necessary to be fulfilled under by-law No. 49, 1907, of the Town of Goderich, by-law No. 532 of the Town of Kincardine, by-law No. 371, 1907, of the Township of Huron, and by-law No. VIII. of the Township of Ashfield, to entitle the said company to receive from the Toronto General Trusts Corporation the said sum of \$——

(Signed)—————

"Chief Engineer."

This form of certificate was settled by the solicitor for the respondent, who followed the form provided by schedule A of the Ontario Railway Act, 1906 (6 Edw. VII. ch. 30).

The certificates were accompanied by a statutory declaration

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Meredith,
C.J.O.

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Meredith,
C.J.O.

of the chief engineer, and a certificate of the secretary of the railway company, as to the number of miles of railway under contract to be constructed, and a letter from the president of the company.

Payments were made from time to time on these certificates to the railway company, all having been made only to the extent of 90 per cent. of the "face value" of the certificates, and there then remained in the respondent's hands the \$30.06.

The trustee acted upon the view that in these circumstances the railway company was entitled to receive $66\frac{2}{3}$ per cent. of the money in the trustee's hands—that is, the proportion which the amount of the guaranteed bonds (\$400,000) bore to the amount of all the bonds that had been issued (\$600,000).

Ninety per cent. of the "face value" of the progress certificates which were issued by the chief engineer exceeded \$400,000; and a question arose as to whether the railway company was entitled to be paid the whole of the money in the hands of the trustee, although it would exhaust the 10 per cent., which was to be paid over only after the completion of the railway and the opening of it as provided by the mortgage-deed.

The trustee was unwilling to accept that view of the railway company's right, and it was decided to have the question determined by the Court.

Accordingly a motion was made under the originating notice provisions of the Rules for that purpose.

No notice of the motion has been found, and it is said that none was served. It appears that counsel for the railway company and for the trustee and counsel for the appellant the Corporation of the Township of Ashfield, went before my brother Middleton and a motion was made to him to determine the rights of the parties as to matters in dispute between them, including the propriety of the respondent's action in making the payments it had made. The motion was made on the 31st March, 1911, and an order was then made that the Corporation of the Township of Ashfield represent all the municipal corporations interested for the purposes of the motion. The motion came on to be heard on the 13th day of April, 1911, when the same counsel appeared, and the matters in controversy were argued. After the argument in Court, a written argument was put in by the solicitor for the Corporation of the Township of Goderich, and was considered

by my brother Middleton; and, after the delivery of a considered judgment by him, an order giving effect to his conclusions was made, which bears date the 13th day of April, 1911, and which was duly passed and entered. (See *Re Ontario and West Shore R.W. Co.*, 2 O.W.N. 104).

By this order it is declared and adjudged that:—

“Upon the Toronto General Trusts Corporation, trustee under the said mortgage, receiving from time to time progress certificates of the chief engineer of the said railway company, in the form filed herein, certifying to 90 per cent. of the value of services and materials done or supplied in the construction of the said railway to the date of such certificates, it is the duty of the said the Toronto General Trusts Corporation, in every such case, to pay to the said railway company out of the moneys in its hands, proceeds of the sale of the guaranteed bonds in the third paragraph of the said mortgage mentioned, two-thirds of the said 90 per cent. set out in such progress certificates so issued and delivered to the said corporation, and that it is the duty of the said the Toronto General Trusts Corporation to make payments from time to time, notwithstanding that the said moneys in its hands, proceeds of the sale of the said guaranteed bonds, may, by payments made in accordance with such certificates, be wholly exhausted before the completion and opening of the said line of railway; and that all payments heretofore made by the said the Toronto General Trusts Corporation to the extent of two-thirds of 90 per cent. of the amount set out in the certificates of the said engineer, issued and delivered to it, have been properly made by the said the Toronto General Trusts Corporation in accordance with the terms of the said mortgage;” and it was so ordered and adjudged, and it was ordered:—

“That the said Toronto General Trusts Corporation do make payment accordingly out of the said proceeds and to the extent only of the said proceeds in its hands from time to time.”

The respondent acted upon this order, and, in accordance with its provisions, paid over to the railway company the whole of the money which had come to its hands except the small balance I have mentioned and the \$317.96.

The action of the respondent in paying over the money that it had received to the railway company is attacked on various grounds.

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORA-
TION.

Meredith,
C.J.O.

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Meredith,
C.J.O.

It is contended that no payments should have been made except on progress certificates issued by an inspecting engineer appointed either by the parties or by the Ontario Railway and Municipal Board, under the provisions of sec. 162 of the Ontario Railway Act, 1906.

It is also contended that no payments should have been made until the unguaranteed bonds had been sold, and the proceeds of the sale of them had come to the hands of the respondent, and then only *pro ratâ* out of the whole proceeds, according to the amounts that had been realised from the sale of both sets of bonds.

It is also contended that the order made by my brother Middleton was made without jurisdiction, and was therefore of no validity, for the following reasons:—

(1) That the foundation for the jurisdiction is the service of a notice of motion, and that none was served.

(2) That the case was not one coming within the Rules as to originating motions.

(3) That there was no authority to order that one of the corporations should, for the purposes of the motion, represent all the corporations, and that the order, having been made, as contended, without notice to them, was not binding on them.

I will first deal with the last of these contentions, because, if the order is a valid order and is binding on all the corporations, the appellants' case fails.

The Rules in force in 1911 as to originating notices were Rules 938 to 943 (inclusive).

Rule 938 provides, among other things, that the trustees under any deed or instrument "may serve a notice of motion returnable . . . for such relief of the nature and kind following, as may be specified in the notice, and as the circumstances may require, that is to say, the determination without an administration of the estate or trust of any of the following questions or matters;" and among these is

"(h) the determination of any question arising in the administration of the estate or trust."

Rule 939 provides that where the notice is served by an executor or administrator or trustee, the person to be served with the notice in the first instance, shall be, where it is served by an executor or administrator or trustee, in the case provided for by clause

(h), the person or one of the persons whose rights or interests are sought to be affected.

Rule 940 provides that the Judge may direct such other persons to be served as may seem just.

I cannot agree with the contention of counsel for the appellants that service of a notice of motion was essential to give jurisdiction to deal with the case under these Rules; the thing to be done was to bring the motion before a competent tribunal, and the notice of motion was only the form by which that was to be accomplished; and, in my opinion, if the person who under the Rule is the person to be served is willing to waive that formality and to go before the Court in order that the motion may be made and dealt with, that course may properly be taken. It would be an extraordinary thing if, in the case of a trustee and a single *cestui que trust*, both of whom, in order to save expense or for any other reason, appear before a Judge and the motion is made to him, in their presence, any order that he makes is made without jurisdiction and is a void order.

The Rules provide (Rule 120) that all actions shall be commenced by the issue of a writ of summons. It would be a startling thing indeed if, although a writ had not been issued, the parties had delivered their pleadings and gone down to trial and judgment had been pronounced and entered, the judgment must be held to be void because the action had not been commenced by the issue of a writ of summons, and the Court which pronounced the judgment was therefore without jurisdiction, and yet that is what the result would be if the contention of the appellants is well-founded.

If I am right in this, the parties were properly before the Court, and it was for the Court to determine whether any other person ought to be served, and, if so, who. What was done was, though in form a direction that one of the municipal corporations should represent the others, in reality a determination by the Judge that the corporation which was before him sufficiently represented the interests of all the corporations—as the cases of all of them were identical—and in effect a determination by the Court that it was not necessary that any other than the persons before him should be served. The case was, therefore, not one in which it was necessary to exercise the powers conferred by Rule 200—which was probably not applicable because the parties

App. Div.
1918

STOTHERS
v.
TORONTO
GENERAL
TRUSTS
CORPORATION.

Meredith,
C.J.O.

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Meredith,
C.J.O.

having the same interest were not "numerous" within the meaning of the Rule.

It ought, I think, to be presumed, in the absence of evidence to the contrary, that the fact that the Corporation of the Township of Ashfield had been appointed to represent the other corporations was communicated to those corporations; and, even if the order were to be considered as having been made as to them *ex parte*, they might have applied under Rule 358 to rescind it.

Rule 193 may also be referred to. It provides that "trustees . . . may sue and be sued on behalf of, or as representing, the property or estate of which they are trustees . . . without joining any of the persons beneficially interested, and shall represent them; but the Court or a Judge may, at any time, order any of them to be made parties in addition to, or in lieu of, the previous parties."

That the matter in controversy came within clause (h) of Rule 938 I have no doubt. The only right which the corporations had against the respondent was as *cestuis que trust* under the mortgage-deed. I have already said that, in my opinion, there was no contractual relation between them and the respondent; any contract there was, was with the railway company; but, when the bonds or the proceeds of them were handed over to the respondent, they became impressed with the trust which is declared by the mortgage-deed as to the application of them by the respondent.

If I am right thus far, it is unnecessary for the disposition of the appeal that the other contentions made before us should be dealt with; but, as the case is one of considerable importance and may go further, I will deal with them.

I am substantially in agreement with the reasons for the judgment of my brother Middleton, on which the order made by him was founded.

The mortgage-deed provides, as do the by-laws of the municipal corporations who are plaintiffs, that the railway company is to be entitled to be paid by the respondent, out of the money in its hands, the 90 per cent. of the face value of the progress certificates issued by the engineer and received by the trustee.

The parties appear not to have had in contemplation the possibility of certificates being issued for amounts aggregating a

sum, 90 per cent. of which would exhaust the whole trust-fund, even if all the bonds should be disposed of at par, but that happened, and there is nothing in the mortgage-deed which justifies the conclusion that the railway company was not entitled to be paid the full 90 per cent. of the aggregate amount of the progress certificates, even if the payments exhausted the whole fund in the hands of the respondent.

It was argued, as I have said, that the progress certificates upon which the payments were made were not progress certificates such as the mortgage-deed and the by-laws provide for; that they should have been issued either by an engineer appointed with the concurrence of the municipal corporations, or the inspecting engineer appointed by the Ontario Railway and Municipal Board, under the provisions of sec. 162 of the Ontario Railway Act, 1906.

I am of opinion that that contention is not well-founded, and that an inspecting engineer appointed by the railway company, as its chief engineer was, was "the inspecting engineer" within the meaning of the mortgage-deed and the by-laws. An engineer to inspect the works, i.e., the works of the railway company, was not appointed by the Ontario Railway and Municipal Board; and indeed those words are not applicable to an inspecting engineer appointed by the Board. The inspecting engineer to be appointed under sec. 152 is an officer of the Board; and it is, no doubt, his duty, when ordered by the Board to do so, to inspect a railway in the course of construction; but it is not for the purpose of enabling him to certify as the inspecting engineer mentioned in the mortgage-deed or by-laws is to certify, but to inspect in the public interest and for the public safety; to require the concurrence of the corporations with the appointment is to read into the instruments something that is not to be found in them, at all events in terms. The parties must be taken to have known what the usual course was as to the issuing of progress certificates, which is, that the engineer of the railway company is the person who issues them.

The Railway Act (sec. 145), dealing with the trusts upon which bonds of a municipal corporation issued for a bonus granted by it to a railway company are to be held and the proceeds of them dealt with, provides for the payment by the trustee on the certificate of the chief engineer of the railway company, in the form provided by schedule A, which is the form in which the progress

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Meredith,
C.J.O.

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Meredith,
C.J.O.

certificates were in this case issued. This shews at least that, in the view of the Legislature, there was no reason why the chief engineer of the railway company should not be entrusted with that duty.

The next question is whether the respondent was justified in paying to the company, as it did, out of the proceeds of the guaranteed bonds, two-thirds of 90 per cent. of the "face value" of the certificates, although none of the unguaranteed bonds had been sold.

If the contention of the appellants is well-founded, no payment could be made until the unguaranteed bonds had all been sold; and that cannot, I think, have been in the contemplation of the parties.

If the unguaranteed bonds had been sold at 10 per cent. of their par value, the result would have been that, instead of the railway company being entitled to be paid the $66\frac{2}{3}$ per cent. it has received, it would have been entitled to be paid 85 per cent. The respondent dealt with the fund in its hands on the same footing as it would have been bound to have dealt with it if the unguaranteed bonds had been sold at par, and in this the respondent certainly dealt out full justice to the municipal corporations.

If the appellants' contention were well-founded, it would have been practically impossible to have carried out the trusts reposed in the respondent. The unguaranteed bonds were not in its possession, and it had no duty with regard to them. They were in the hands of the railway company—see para. 2 of the mortgage-deed—the respondent had no means of knowing what disposition had been made of them, or whether or not they had been disposed of

It may be admitted that it is difficult to say what the exact meaning of the provision I am dealing with is; but I am of opinion that, in paying out of the proceeds of the guaranteed bonds two-thirds of 90 per cent. of the face value of the certificates, the respondent did not contravene it.

I am also of opinion that, even if the respondent was wrong in accepting certificates signed by the chief engineer, and in paying out the proceeds of the guaranteed bonds, including the 10 per cent., to the railway company, it is protected from liability by the terms of the mortgage-deed. As I have mentioned, it is provided in it that "the trustee shall not be responsible for any error or mistake made by it in good faith."

It is also provided (para. 14) that "the trustee shall be protected in acting upon any . . . certificate . . . believed by it to be genuine and to have been . . . signed by the proper party;" and that "the trustee shall not incur any liability or responsibility whatever in consequence of permitting . . . nor for any other account, matter or thing other than the wilful breach of the party of the second part hereto" (i.e. the trustee) "of the trusts hereby created."

It was contended by the respondent's counsel that, even if the respondent was, in the matters complained of, guilty of a breach of trust, and it is not protected from liability by the provisions of the mortgage-deed, it should be relieved from liability under the provisions of sec. 37 of the Trustee Act; that section empowers the Court to relieve from personal liability for a breach of trust a trustee if he has acted honestly and reasonably and ought fairly to be relieved.

These provisions should, in my opinion, be applied. That the trustee acted honestly is beyond question, and that it acted reasonably is also shewn. What it did was done on the advice of an experienced solicitor, and was also, in the view of an experienced Judge, what it was bound to do, and I cannot conceive how it can be said that the trustee did not act reasonably, and as to the money that was paid out after the order of my brother Middleton was made, it is an *à fortiori* case for the application of the section.

If it were necessary for its defence, the respondent is entitled to rely on the provisions of sec. 66 of the Trustee Act, or the provision corresponding to it in force when the application to my brother Middleton was made. That section enables a trustee to apply to the Court for its opinion, advice or direction "on any question respecting the management or administration of the trust property," and provides that the trustee "acting upon the opinion, advice or direction given, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee . . . in the subject-matter of the application, unless he has been guilty of some fraud, wilful concealment or misrepresentation in obtaining such opinion, advice or direction."

The order of my brother Middleton, if it were not supportable

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Meredith,
C.J.O.

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Meredith,
C.J.O.

as properly made under the originating notice Rules, may well be treated as if it had been made under this section.

I am also of opinion that the claim of the appellants is barred by the Statute of Limitations (R.S.O. 1914, ch. 75, sec. 47) as to all sums paid to the railway company more than 6 years before the date of the issue of the writ (14th November, 1914).

It is not necessary to say anything as to the \$20,000 of unguaranteed bonds in the hands of the respondent, which, by the judgment in appeal, it was ordered to deliver to the appellant Stothers, as that part of the judgment is not the subject of an appeal by either party.

The claim of the appellants as to the interest mentioned in para. 11 of the statement of claim is, in my opinion, unfounded. As alleged in para. 10 of the statement of defence, the mortgage-deed makes no provision as to interest on the proceeds of the sale of the unguaranteed bonds. By an agreement between the respondent and the railway company, the respondent agreed to allow to the company interest at certain stated rates on the money which came to its hands while it remained there, and the respondent in pursuance of that agreement allowed and paid to the railway company the agreed interest except to the extent of the \$317.96 which it has been, by the judgment in appeal, ordered to pay to the appellant Stothers. The appellant corporations had no right to this money. All that they had a right to have applied in the manner provided by the mortgage-deed was the proceeds of the sale or pledge of the bonds which they had guaranteed. This claim is an extraordinary one, in view of the fact that the amount of the interest that was paid to the railway company was used to pay interest on the guaranteed bonds, and therefore in ease of the municipal corporations which had guaranteed them.

If I had been of a different opinion as to the rights of the appellants, it would have been necessary to consider whether the relief claimed could properly be awarded in an action in which the assignee of the railway company is a party plaintiff. He has no higher rights than the railway company had, and it certainly had no right to complain of the application of money which itself had received.

I would, for these reasons, affirm the judgment appealed from and dismiss the appeal with costs.

Since the foregoing was written, I have had an opportunity of reading the opinion of my brother Hodgins, and desire to add a few words as to the question with which he first deals. His view seems to lead to the conclusion that, unless money had been obtained by the sale or pledge of the unguaranteed bonds, and was in the hands of the respondent, no payment whatever could be made out of the proceeds of the guaranteed bonds: that, I venture to think, cannot have been in the contemplation of the parties, and would have frustrated the object the corporations had in guaranteeing the bonds, of having the railway constructed. It also leads to the conclusion that, if the railway company had been able to secure, from some source other than the sale or pledge of the unguaranteed bonds, an amount equal to the face value of them, and had used it in the construction of the railway, no part of the proceeds of the sale of the guaranteed bonds could under any circumstances be paid over to the railway company. That appears to me—I say it with great respect—the *reductio ad absurdum*.

That that had actually happened appeared from the certificates of the engineer, for his certificates shewed that, in all, the materials and services had been provided and done to an amount 90 per cent. of which exceeded \$600,000. It may be said that the certificates do not shew that all this had been paid for, but that is, I think, not material. The important thing that was shewn by the certificates was that materials and services to that amount had gone into the railway.

I apprehend that, if the contractor who constructed the railway had been willing to take the unguaranteed bonds at their face value in payment, or payment *pro tanto*, for what he had done, and was not paid for out of the proceeds of the guaranteed bonds, though technically it could not be said that the respondent had in its hands any proceeds of the sale or pledge of the unguaranteed bonds, that course might have been properly adopted. In substance the transaction was the same as if it had had them in hand and had paid them out on the certificate of the engineer.

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Meredith,
C.J.O.

MACLAREN and MAGEE, JJ.A., agreed in the result.

FERGUSON, J.A.:—This is an action for breach of trust. The trust-deed provides:—

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Ferguson, J.A.

"The trustee shall not be responsible for any error or mistake made by it in good faith."

"The trustee shall be protected in acting upon any . . . certificate . . . believed by it to be genuine and to have been . . . signed by the proper party."

"The trustee shall not incur any liability or responsibility whatever in consequence of permitting . . . nor for any other account, matter or thing other than the wilful breach of the party of the second part hereto" (the trustee) "of the trusts hereby created."

I am of opinion that, on the proper construction of these provisions, the plaintiffs cannot succeed unless they establish that the defendant did the acts complained of knowing that it was acting contrary to the terms of the trust. This, I think, the plaintiffs have failed to establish; and, on the contract made between the parties, the action must fail.

I am also of the opinion that, under the circumstances adduced in evidence, it must be found that the defendant acted in good faith, honestly, and reasonably, and is, outside of the provisions of the contract to which I have referred, entitled to the benefit, protection, and relief afforded by sec. 37 of the Trustee Act, R.S.O. 1914, ch. 121, which reads as follows:—

"37. If in any proceeding affecting a trustee or trust property it appears to the court that a trustee, or that any person who may be held to be fiduciarly responsible as a trustee, is or may be personally liable for any breach of trust whenever the transaction alleged or found to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court in the matter in which he committed such breach, the court may relieve the trustee either wholly or partly from personal liability for the same."

I have, for these reasons, not considered it necessary to deal with the regularity and validity of the order of Mr. Justice Middleton, or with the issue raised as to the meaning of the third clause of the trust-deed dealing with the application of the mortgage moneys.

I would dismiss the appeal with costs.

HODGINS, J.A.:—To my mind the proper meaning of the clause in the mortgage in question, No. 3, is that the proceeds of the guaranteed bonds, that is, the money derived from them, should only be paid out *pro ratâ* with the proceeds of the unguaranteed bonds, that is, the money derived from them. To construe it as meaning that the proceeds of the guaranteed bonds are to be paid out *pro ratâ* with a sum of money which did not then exist and has never existed, but merely represents the par value of worthless bonds, seems to me illusory and unjustified. The whole object of the elaborate scheme of bond guarantee and mortgage was that money should be raised from both classes of bonds, and that the money produced by the guarantee of the municipalities should go into the road proportionately with the amount of money which the road itself or its promoters raised from the unguaranteed bonds. In no other way would the railway be constructed or finished, and I should have imagined that that would have occurred to those concerned in making the payments.

Emphasis must be placed upon the word "proceeds." The proceeds of the sale or of the pledging of the unguaranteed bonds must, I think, necessarily mean the amount produced by them, and that is the basis which fixes the proportion of the *pro ratâ* advances.

The construction urged by the respondent, which apparently is what has been acted upon, is that the words "the proceeds of the sale or pledge of the other bonds" do not mean the money derived from them, but rather the face value of the bonds irrespective of whether they produced any proceeds or not. I cannot—with very great respect to those who have a contrary opinion—bring myself to adopt that view of the clause in question. And, subject to what may have to be said of the subsequent proceedings, I think the respondent, as trustee, was entirely unjustified in assuming that the moneys required for the construction of the road, and to be advanced proportionately with that to be derived from another source, could be validly expended in the proportion indicated, when as a matter of fact there were no other moneys to settle what that proportion was.

The face value of the bonds does not seem to me to be an element either within the words of clause 3 or the scheme of the financial operation, and the results are what one might expect.

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Hodgins, J.A.

App. Div.
1918

STOTHERS
v.
TORONTO
GENERAL
TRUSTS
CORPORATION.

Hodgins, J.A.

It is a pity that Mr. Garrow's written argument directed to this point was dismissed without attention being paid to his very practical suggestion that it was the duty of the trustee to get exact information as to the "proceeds" of the unguaranteed bonds. I also find it difficult to understand the remark of Middleton, J., which closes his opinion in *Re Ontario and West Shore R.W. Co.*, 2 O.W.N. 1041, 1043: "I cannot think that the proceeds of the guaranteed issue is to be compared with the face value of the unguaranteed bonds, and this is not stipulated." The exact opposite was Mr. Garrow's contention—that "the proceeds of the guaranteed bonds are to be paid out, not *pro ratâ* with the unguaranteed bonds (i. e., upon their full face value), but *pro ratâ* with the proceeds of the sale or pledge of them, which is a totally different thing." It is to be greatly regretted that this new point, which is now the principal one, should have been raised after the argument of the motion had taken place and in such a way as to lead it to be treated as comparatively unimportant. This is especially so, as the order, when taken out, validated all previous payments, upon the basis of this view of Mr. Garrow's point, though not included in the application or argument, as is indicated by the learned Judge's reasons for judgment in 2 O.W.N. 1041.

Another point: The wording of clause 3 has not been followed in a further respect, as in my judgment it ought to have been. The clause speaks of the progress certificates, "which are to be issued for amounts from time to time not exceeding 90 per cent. of such services or materials as are certified to by the engineer appointed to inspect the said works and *pro ratâ* as aforesaid." That seems to indicate that in the first place the engineer has to certify to services and materials, and then he has to issue progress certificates in amounts not exceeding 90 per cent. of what he determines and states to be the then value, and thereafter the trustee shall pay out to the extent of the face value but only *pro ratâ* as aforesaid. This part has been taken as meaning that the trustee is to pay a fixed proportion of 66 per cent. of 90 per cent. of the face value of the certificates, and may ignore any change brought about by sale or disposal of the other bonds. This view has been pushed to the extent of requiring the trustee to retain no balance in hand at all, although the section goes on to

provide that the balance shall be paid only *after the completion of the railway*. It seems a reasonable meaning to give to the clause that, while the certificates as to the value of the services and materials may state their value at 100 per cent., the progress certificates must not exceed 90 per cent. thereof, and that 90 per cent. is to be paid on the *pro ratâ* basis, partly from the guaranteed and partly from the unguaranteed bonds, so that there will be always in hand a balance of 10 per cent. of the value of the services and materials as certified to. The payments made seem to be based first upon the assumption that there are proceeds from the unguaranteed bonds, and that payments are being made out of those proceeds, and then upon the assumption that the road will be finished from the same source. The result is what might have been foreseen—the road unfinished and useless and the whole cash proceeds expended, notwithstanding that 10 per cent. was directed to be retained until the road or section was opened, and that each certificate was intended to be discharged by two proportionate sums and not part of it only by one sum.

I therefore totally disagree with the meaning attached to clause 3 in the order referred to.

But, notwithstanding what may or may not be the proper meaning of clause 3, it is said that the order of Middleton, J., already referred to, construing this clause, is binding and conclusive, and that all that has been done is justified by that order. While my view as to the meaning of the clause and the plain duty of the trustee may be different from what is stated therein, the order is one whose bearing needs very careful consideration. It is dated the 13th April, 1911, and is as follows:—

“1. This Court doth declare that, upon the Toronto General Trusts Corporation, trustee under the said mortgage, receiving from time to time progress certificates of the chief engineer of the said railway company, in the form filed herein, certifying to 90 per cent. of the value of services and materials done or supplied in the construction of the said railway to the date of such certificates, it is the duty of the said the Toronto General Trusts Corporation, in every such case, to pay to the said railway company out of the moneys in its hands, proceeds of the sale of the guaranteed bonds in the third paragraph of the said mortgage mentioned, two-thirds of the said 90 per cent. set out in such progress certificates so issued

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Hodgins, J.A.

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Hodgins, J.A.

and delivered to the said corporation, and that it is the duty of the said the Toronto General Trusts Corporation to make payments from time to time, notwithstanding that the said moneys in its hands, proceeds of the sale of the said guaranteed bonds, may, by payments made in accordance with such certificates, be wholly exhausted before the completion and opening of the said line of railway; and that all payments heretofore made by the said the Toronto General Trusts Corporation to the extent of two-thirds of 90 per cent. of the amount set out in the certificates of the said engineer, issued and delivered to them, have been properly made by the said the Toronto General Trusts Corporation in accordance with the terms of the said mortgage, and doth order and adjudge the same accordingly."

It will be observed that the order purports in so many words to lay down the duty of the trustee and to say that such duty is to pay two-thirds of the 90 per cent. set out in the progress certificates, and that it is the further duty of the corporation to make these payments from time to time, notwithstanding that they may exhaust the moneys derived from the sale of the guaranteed bonds before the completion and opening of the line of railway, and that it validates all payments made upon that basis previous to the date of the order.

I venture to think that there was not jurisdiction to make the last part of the order. The trustee had apparently made payments on its own unaided view of the construction of the mortgage-deed and of the clause in question, and it came into Court only on an application for relief of the nature and kind provided for by Rule 938 as to two specific matters set out in 2 O.W.N. 104. I am unable to find in that Rule any warrant for the determination of a question of liability as between the trustee and those interested, arising upon what had previously occurred. If there was liability, it had already accrued and could not be relieved against. What had been done had taken place without the sanction of the Court, no doubt upon the advice of counsel for the trustee, but with full notice that the municipalities feared that there were no proceeds from the unguaranteed bonds (letter Dickinson & Garrow to trustee, Nov. 20, '08). In fairness to the respondent it should be stated that in reply to that letter it stated that it was paying 66 per cent. of the amount of the cer-

tificates "being the share of the guaranteed bonds," to which the solicitor for Goderich made no reply. The trustee was entitled to whatever protection was afforded by law at that time; but the Rule was not intended to cover, and in my judgment does not cover, the settlement *ex post facto* of the responsibility or liability of the trustee originating in past transactions giving rise to rights or claims.

Of course if the order is right in its construction of clause 3 of the mortgage, this objection loses its weight, for then what the trustee did was correct, and it is not necessary for it to rely upon the order to justify it.

As to that part of the order itself which deals with the 10 per cent. and with the status of the engineer, if the parties who applied were *cestuis que trust* under a deed or instrument, then Rule 938 would apply. I think the Ontario West Shore Railway Company did occupy that position, and had the right to apply for the construction of the mortgage or trust-deed or that part of it which dealt with the payment out of moneys received from the sale of the bonds for which the mortgage was the security, and then remaining in the hands of the trustee. I think the order is correct in its interpretation as to the engineer, so far as it was necessary to determine it in regard to the disposition of the 10 per cent. It was contended, however, that the appellants were mere guarantors and not beneficiaries under the trust-deed, and so were unaffected by the order. If so, I fail to see any theory on which the appellants are entitled to recover against the respondent. The appellant Stothers represents the railway company, to which all the moneys were paid, and which fraudulently obtained and misapplied them. He cannot have any claim based upon a state of facts such as that.

The municipalities passed by-laws and guaranteed payment of the bonds and interest to aid the railway company in disposing of the bonds, but the guarantee was given to outsiders who might acquire the bonds. They agreed that those bonds were to be handed over to the respondent to be sold or disposed of by it or by the railway company, and the proceeds were to be dealt with between the railway company and the respondent in a way then agreed upon by them. They parted with their guarantee, intending it to be acted upon and operative before any moneys reached

App. Div.
1918

STOTHERS
v.
TORONTO
GENERAL
TRUSTS
CORPORATION.

Hodgins, J.A.

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Hodgins, J.A.

the respondent's hands as trustee. If the trustee negligently or wrongly handed over the proceeds, then, unless there is some agreement in the mortgage, some contract with or some trusteeship for them in the mortgage-deed, I cannot see how they can call the respondent to account as trustee. The right, if any, does not arise out of the guarantee as such: that had been properly handed over to the purchasers of the bonds when they acquired them, and so the municipalities are liable just as they intended to be and no more. They suffer because, after they became liable, the proceeds were applied not as intended, but in a way which landed the whole enterprise in disaster. They have to pay, but only what they agreed to pay, and their grievance is that they have got no railway as security for what they have to pay. But, unless the trustee became their trustee as to the proceeds, no right to look to the trustee arises. I think, however, the municipalities have an interest under the mortgage-deed that enables them to maintain this action. Clause 3 of the mortgage-deed begins thus: "As to certain of the bonds hereby secured, which have been or may hereafter be guaranteed by certain municipalities in the said counties or some of them it is hereby stipulated and agreed, *for the purpose of securing the said municipalities*, as follows." (Then follows the provision as to *pro ratâ* payments etc.)

This agreement, binding upon the trustee, while made with the Ontario West Shore Railway Company, is clearly for the benefit of the municipalities, and is so expressed. It gives them the right to have the stipulation enforced or to get damages by way of an account if it is disregarded. It deals with property, the proceeds of the guaranteed bonds, which proceeds are clearly bound for the benefit of the municipalities by the terms of the stipulation for their protection, which the respondent was bound to carry out.

This was the term upon which the trust arose as to these proceeds, namely, that they should be parted with only in a specific way. The carrying out of this term was in fact needed to secure the municipalities, and in law it was attached to the moneys when they reached the hands of the respondent as trustee. The by-laws purport to make this provision a condition attached to the proceeds when paid to the trustee, and the statute 9 Edw. VII. ch. 139 recites that the mortgage was, before its execution, approved by the various municipalities. The mortgage states that the trustee

accepted the trusts created by the mortgage and agreed to "exercise the powers and duties herein set out to the best of its ability." This stipulation creates, in my judgment, a right which "may be conferred by way of property, as, for example, under a trust," though it "cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*:" *per* Lord Haldane, L.C., in *Dunlop Pneumatic Tyre Co. Limited v. Selfridge and Co. Limited*, [1915] A.C. 847, 853.

"If the contract, although in form it is with A., is intended to secure a benefit to B., so that B. is entitled to say he has a beneficial right as *cestui qui trust* under that contract; then B. would, in a Court of Equity, be allowed to insist upon and enforce the contract:" *per* Cotton, L.J., in *Gandy v. Gandy* (1885), 30 Ch.D. 57, at p. 67.

In *Page v. Cox* (1851), 10 Hare 163, at p. 168, Turner, V.-C., states in words applicable here the effect of a clause in a partnership agreement that the vendor might, if she should think fit, buy her husband's share and continue the business: "The effect of the clause cannot, I think, be stated lower than that it was an agreement by both parties, that, upon the death of either of them, his share should be dealt with according to the provisions which the clause contains;" and that learned Judge held it to be enforceable by the widow.

Referring to *Gregory v. Williams* (1817), 3 Mer. 582, where the agreement was to pay out of property, Jessel, M.R., in *In re Empress Engineering Co.* (1880), 16 Ch.D. 125, says (p. 129): "One of the parties to the agreement may constitute himself a trustee of the property for the benefit of the third party."

The result of this conclusion is, that the order in question is and ought to be binding upon those municipalities which were actually or legally represented before the Court in regard to those questions which could properly arise upon the motion made, provided the order rests upon a proper foundation.

On the question of practice as to the effect of the absence of a notice of motion, which is said to involve the total invalidity of the order, reliance is put upon the maxim *Omnia præsumuntur rite esse acta*. I find in the evidence an absence of proof that no notice of motion was served upon any one, and I think the maxim just referred to may and should be acted on by this Court in dealing with the matter.

App. Div.
1918

STOTHERS
v.
TORONTO
GENERAL
TRUSTS
CORPORATION.

Hodgins, J.A.

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Hodgins, J.A.

But I must not be understood as agreeing with the argument that a notice of motion is a matter of no consequence, or that its absence, if proved, might not result in undermining an order made if the action or matter had not been properly initiated and brought into Court. Under the Judicature Act then in force, R.S.O. 1897, ch. 51, sec. 122, the Judges are given power to make Rules for regulating the pleadings, practice, and procedure in the High Court of Justice and in the Court of Appeal, and it is provided by sec. 122, sub-sec. 4, that all Rules of Court, after they come into operation, shall regulate all matters to which they extend, until annulled or altered.

By sec. 129, the Consolidated Rules of Practice and Procedure are declared to be valid as if contained in an Act of the Legislature.

Rule 938 provides that those entitled to move may serve a notice of motion returnable before a Judge of the High Court either in Court or Chambers, as the case may be, for such relief of the nature or kind following *as may be specified in the notice*, and as the circumstances of the case may require, in any of the following matters or questions. Then follow certain descriptions of matters or questions, some of which are:—

(a) Any question affecting the rights or interests of the person claiming to be a creditor, devisee, legatee, next of kin or heir at law, or *cestui que trust*.

(g) The opinion, advice or direction of a Judge pursuant to section 37 of the Act respecting Trustees and Executors and the Administration of Estates.

(h) The determination of any question arising in the administration of the estate or trust.

Under Rule 356, when any person other than the applicant is entitled to be heard upon a motion, he shall be served with a notice thereof.

By Rule 524 it is provided that affidavits upon which a notice of motion or petition is founded shall be filed before the service of the notice of motion or petition.

Rule 120 says that all actions shall be commenced by the issue of a writ of summons, which shall be prepared by the plaintiff, and shall contain the names of the parties and the characters in which they sue and are sued, the office for appearance, and a short statement of the claim.

By Rule 132 the writ shall be in force for 12 months from the date thereof.

The Rules following 132 contain very detailed provisions for various endorsements such as the address of the plaintiff, the name of the solicitor, etc., and elaborate directions for the service of the writ.

I am not prepared to go the length of saying that an action can be begun without the issue of a writ, or, where it is allowed by notice of motion, without the service of any such notice. The Rules say distinctly the contrary; and, as the Rules have the force of law, it would seem to me to be ignoring instead of interpreting them so to decide.

To hold that an action which the Rules require to be commenced by a writ of summons or notice of motion may be initiated by an informal interview with a Judge in his Chambers, and a request that he adjudicate upon something which may or may not be set out in any formal way, would be to wipe out our present body of Rules. If the Rule requiring in the most positive terms an action to be commenced by a writ of summons can be entirely disregarded, so can the Rule requiring pleadings to be delivered, and, as well, any other Rule.

"Action" is defined in the Judicature Act, R.S.O. 1897, ch. 51, sec. 2 (3), as meaning *a civil proceeding commenced by writ*, and that has been held to include proceedings commenced by notice of motion under Rules 938 *et seq.* But it has not yet been determined that it includes a civil proceeding begun by consent and of an entirely informal character and initiated in a way which is not that laid down by the Rules.

It is for these reasons that, in regard to this order, I prefer to rest my conclusions upon the fact that, failing actual affirmative proof, the presumption of law is that the proceedings were properly commenced. Assuming, therefore, the valid status of this order, how does it stand as to those now appealing to this Court?

The order recites that the Court ordered that the Township of Ashfield do represent for the purposes of the said application the Township of Huron and the Town of Kincardine. The Township of Ashfield was before the Judge, and also the Town of Goderich, both of them being recited as having appeared by counsel.

What were the purposes of the application? The evidence

App. Div.
1918

STOTHERS
v.
TORONTO
GENERAL
TRUSTS
CORPORATION.

Hodgins, J.A.

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Hodgins, J.A.

at the trial and the affidavit of Moyes make it quite clear that all that was before the learned Judge was the question of the 10 per cent. held back, whether it could be paid out, as the other 90 per cent. had been, upon the engineer's certificate, and the status of the engineer.

This he heard argument upon and reserved judgment. That was what the order of representation dealt with, and that alone. After the argument, Mr. Garrow, for the Town of Goderich, heard of the application and sent in a written argument dealing with the application and raising a new point not previously brought up and not argued, the last question by the way that the Ontario West Shore Railway Company would wish to raise, as it had got all there was except the 10 per cent. This is dealt with as a new question by the learned Judge (see 2 O.W.N. at p. 1043) and as one arising after the argument.

As to that question, no representation order was made, nor indeed is there any evidence that the Township of Ashfield or its solicitor knew that the point was up or learned of it afterwards. The order then, as to that question, binds neither Huron nor Kincardine, but it does bind Goderich, for the latter, having raised the point, apparently acquiesced in its disposition. I have some doubt as to whether it binds Ashfield on this particular matter; but I think, in the absence of affirmative evidence that the solicitor for that township was not informed that this point was raised and determined, that the order must govern. It would have been easy to have satisfied the Court that the solicitor had in fact no knowledge, but the appellants refrained from clearing up the doubt.

But I do not wish my judgment to depend wholly upon such a narrow ground. The Rules permitting an adjudication without direct notice to the parties affected are limited.

By Rule 200, in any action where there are numerous parties having the same interest, one or more of such parties may sue or be sued, or may be authorised by the Court to defend on behalf and for the benefit of all parties so interested.

Rule 193 provides that trustees may sue and be sued on behalf or or as representing the property or estate of which they are trustees, without joining any of the persons beneficially interested, and shall represent them; but the Court or a Judge may, at any

time, order any of them to be made parties in addition to, or in lieu of, the previous parties.

Clearly neither of these Rules applies (*Re Braybrook* (1916), 60 Sol. J. 307); but, if Rule 193 could be invoked, can the order of representation be justified on the ground that the Judge, having by that Rule the right to add parties, or by Rule 940 or any other order the right to direct what other person should be served, treated the order as if he thought no one but the Township of Ashfield was a necessary or proper party? To direct the representation of certain parties by another party is not equivalent to a determination that they are not interested, but the reverse; and, if interested, then they cannot be deprived of their right, without notice or proper representation.

I do not think this Court can treat the order as meaning anything except what its plain language says, and that is representation, which, if properly done, involves all the consequences of actual appearance: *Holmsted's Judicature Act*, 4th ed., p. 439. As I have pointed out, the representation here was illusory as to what appears now to be the main question at issue. I think that part of the order is without legal foundation, under any of our Rules, and that Huron and Kincardine are not bound by the order of representation.

I should be glad if I could come to the conclusion that the trustee was absolved by the subsequent provisions of the mortgage-deed. By them, the trustee is not to be made responsible for any error or mistake made by it in good faith, nor is it to incur any liability or responsibility except for wilful breach of the trusts created by the deed.

If the municipalities are entitled to enforce the trust in their favour, they must be bound by these provisions. But, as I view the position of the trustee, it failed to carry out the trust according to its terms, and did so wilfully, in the sense that, having had its attention called to the exact phraseology of the clause, it decided to ignore its plain meaning. The trustee did this with its eyes open and upon its solicitor's advice that it could pay out without regard to whether the unsecured bonds were sold or not or applied in payment of the construction of the road, and the word "wilful" does not necessarily import blind determination but rather clear and definite resolve. "It amounts to nothing more than this,

App. Div.
1918

STOTHERS
v.
TORONTO
GENERAL
TRUSTS
CORPORATION.

Hodgins, J.A.

App. Div.
1918

STOTHERS
v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Hodgins, J.A.

that he knows what he is doing and intends to do what he is doing, and is a free agent:" *per* Bowen, L.J., in *In re Young and Harston's Contract* (1885), 31 Ch. D. 168, 175.

The error into which the trustee fell, and, judging from the order, in very good company, was due, I think, to a total disregard of the duty of the trustee in relation to the municipalities, based on the idea that no such duty existed. The trustee made no inquiries whatever as to the unguaranteed bonds, their sale or their proceeds, and none as to the actual construction of the road. See *In re Brookes*, [1914] 1 Ch. 558. The trustee proceeded, with due caution, upon the dry legal road of its mortgage-deed, and, in my humble judgment, mistook the path.

I grant the trustee's good faith, but ignoring the plain words of the trust is not, I think, to be classed as an error or mistake which good faith condones.

I agree in the conclusions on this point of the Court of Appeal in *Whicher v. National Trust Co.* (1910), 22 O.L.R. 460, which in the Privy Council was reversed upon the facts of the case without any opinion being expressed upon this point. So far as the Trustee Act is concerned, I am unable to come to the conclusion that the respondent acted reasonably, and I have given my reasons therefor. Consequently, sec. 37 cannot be applied. "It would be a dangerous doctrine to enable a well-meaning trustee, simply by the exercise of his honest and reasonable judgment as to the construction of the terms of his trust, to deprive one man of his fortune and hand it to another:" *per* Magee, J.A., in the *Whicher* case, at p. 483. As to sec. 66, in so far as the respondent acted thereafter under the order in question, I think it is protected, but advice under that section cannot have a retrospective effect.

The interest allowed by the respondent is not within the terms of clause 3, and its payment can form no part of the claim against it.

As to the municipalities of Huron and Kincardine, recovery can be had of the damage they sustained by the course pursued by the respondent, wholly unaffected by the order. As to Ashfield, it must be held to be bound by the terms of the order, for the reasons I have already given.

The judgment in appeal should be affirmed as to the appellants other than Huron and Kincardine, without costs, while the successful appellants should have one-half of the costs of action and of

this appeal, which as to them should be allowed. They appear by the same solicitor as the other appellants, so that the costs should be divided as I have mentioned. The damages must be referred to the Master at the point most convenient to the appellants Huron and Kincardine, and if they cannot agree this should be determined by the Court.

It is impossible to part with the case without drawing attention to the apparent ease with which one man was enabled to extract from the source provided by the municipalities the whole amount raised. Whether the municipalities through whose territory the road was being built were asleep or not, does not appear. The respondent admits that it made no inquiry as to the fate of the unguaranteed bonds nor as to their proceeds, notwithstanding that that point was mentioned as one of the bases of the proportionate payments, nor as to whether the road was being built or not. The provision in the mortgage contained the same "joker" that wrecked the Grand Valley Railway Company by enabling bonds to be signed to the extent of \$15,000 per mile of single track "now or hereafter constructed or *under contract to be constructed*." This latter phrase enabled a dummy company to make a contract with the railway company to construct 40 miles, and thus authorised bonds to be issued for \$600,000 in advance of the doing of any work or construction, which it was intended should form the foundation for the security. I think trust companies should scrutinise the Acts authorising a bond issue, and refuse to act as trustees when the terms of the trust they accept permit the construction contract to be in the hands of a promoter who can nominate and pay the so-called chief engineer. Such a device can well wreck the whole enterprise, and trustees acting in such a matter should, for their own sake, if not for that of others, insist upon a proper construction company, an independent engineer, and a real acquaintance with the financial methods of those spending the money.

Appeal dismissed (HODGINS, J.A., dissenting in part).

App. Div.
1918

STOTHERS

v.

TORONTO
GENERAL
TRUSTS
CORPORATION.

Hodgins, J.A.

1918

[APPELLATE DIVISION.]

Dec. 21.

REX v. McCranor.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 40—Selling Intoxicating Liquor in Hotel—Evidence of Detectives or Spies—Participation in Offence—Necessity for Corroboration—Application of Rule as to Accomplices—Corroboration by Testimony of Defendant—Sufficiency of Evidence to Warrant Conviction—Appeal to District Court Judge—No New Evidence Taken—Conviction Quashed—Opinion of Judge as to Credibility of Witnesses, Formed in Previous Case—Further Appeal to Appellate Division—Conviction Restored—Evidence of Prior Conviction—Questions Put to Defendant on Cross-examination—Canada Evidence Act, sec. 12—Ontario Evidence Act, sec. 19 (1).

Upon appeal by the prosecutor from an order of a District Court Judge quashing a conviction of the defendant by a Police Magistrate for selling intoxicating liquor contrary to the provisions of sec. 40 of the Ontario Temperance Act, 6 Geo. V. ch. 50:—

Held, that if the appeal had not been set down in time the defendant had waived the irregularity by obtaining enlargements of the hearing, or, if not, the Court could and should extend the time.

The magistrate convicted the defendant upon the testimony of two "whisky detectives," persons employed by the Ontario Liquor License Department, who went to the defendant's hotel on a certain day for the purpose of obtaining evidence against him, and who swore that one of them then and there bought a bottle of whisky from the defendant; the defendant testified on his own behalf, and swore that he did not remember selling the bottle of whisky on the day named by the detectives. The District Court Judge had before him on the appeal to him the evidence taken by the magistrate; no further evidence was adduced before him. He did not believe the evidence of the detectives, because, it was said, they were discredited in a previous case before him, and he therefore quashed the conviction:—

Held (MULOCK, C.J.Ex., and CLUTE, J., dissenting), that the conviction should not have been quashed and must be restored.

Although juries are to be warned against accepting the uncorroborated evidence of accomplices, they may disregard the warning and convict notwithstanding the absence of corroboration. But even this rule of practice does not apply to a detective or spy who participates in the offence for the purpose of obtaining evidence—his evidence does not require corroboration.

Rex v. Bickley (1909), 73 J.P. 239, followed.

Per SUTHERLAND, J.:—If corroboration were needed, it might be found in the evidence of the defendant, whose attempted denial was so halting and hesitating as to amount in the circumstances to a practical admission of the offence.

Per MULOCK, C.J.Ex., and CLUTE, J.:—An informer or detective is not an accomplice, and his evidence does not, therefore, strictly speaking, require corroboration; but where the complainant and witness invites the accused to commit the offence, his evidence should be examined with extreme care and caution, whether by Judge or jury; and, in the absence of any corroborative evidence, the question is, what weight, if any, should be given to it. The District Court Judge did not believe the detectives upon whose uncorroborated evidence the conviction was made; and the Court was not justified in reversing his decision.

Per RIDDELL, J.:—It was objected that evidence that the defendant had been previously convicted was admitted during the trial by the magistrate before the conviction in question was made; but that was an error: the defendant was, in cross-examination, asked about previous offences, but that was allowable: see sec. 12 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and sec. 19 (1) of the Ontario Evidence Act, R.S.O. 1914, ch. 76.

JAMES MCCRANOR, the defendant, who kept the Avenue Hotel in the city of Fort William, appeared before the Police Magistrate for that city on the 25th October, 1917, on a charge of having sold intoxicating liquor on the 27th September, 1917, in his hotel, contrary to the provisions of the Ontario Temperance Act, 6 Geo. V. ch. 50, sec. 40. The defendant pleaded "not guilty," but was convicted by the magistrate; as it was a second offence, he was sentenced to 6 months' imprisonment. He appealed to the Judge of the District Court of the District of Thunder Bay, who, on the 1st March, 1918, allowed the appeal. The prosecutor, a Government inspector, obtained the certificate of the Attorney-General under sec. 94 (1) of the Act, and now appealed to this Court. . .

App. Div.
1918
—
REX
v.
MCCRANOR.

December 10. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, LATCHFORD, and SUTHERLAND, JJ.

J. R. Cartwright, K.C., for the appellant, argued that the District Court Judge should not have quashed the conviction, at least without hearing further evidence, as there had been ample testimony given upon which the magistrate could convict. (He was stopped by the Court.)

J. W. Bain, K.C., for the defendant, respondent, argued, first, that the appeal was not properly before the Court, not having been set down in time. On the merits, he said that the magistrate had wrongly convicted on the uncorroborated evidence of two "whisky detectives," whose testimony needed corroboration, in the same way as that of accomplices. The learned District Court Judge properly took judicial notice of the fact that he had disbelieved these detectives in another case. He also referred in his reasons to discrepancies in the evidence of the two detectives.

Cartwright, in reply, contended that, if there had been any delay in setting down the appeal, the right of the respondent to object to the delay had been waived. An informer was not an accomplice, and his evidence did not require corroboration: *Regina v. Dowling* (1848), 3 Cox C.C. 509. But, if it did, the evidence of the accused himself was in a sense corroboration. The District Court Judge should not have set aside the conviction without hearing further evidence. He had no right to disbelieve the evidence which the detectives gave in this case, on account of the unreliability of their testimony in a previous case.

App. Div.
1918
REX
v.
McCRANOR.
Riddell, J.

December 21. RIDDELL, J. (after setting out the facts as above):—The evidence was that of two “whisky detectives” in the employ of the Ontario Liquor License Department, and of long experience in their occupation. They swear categorically that they went into the defendant’s bar, and that one of them bought a bottle of Scotch whisky from him, paying therefor \$3. There are trifling differences between the witnesses in matters of detail, but not more than what are seen in almost every case between perfectly reliable witnesses; and their long and elaborate cross-examination did not shake their evidence in any degree.

The defendant was called on his own behalf: he plays a very common role—skirting the promontory of direct perjury, he “does not remember”—this is a sample:—

“Q. You have heard what these men say about selling that bottle of whisky on Thursday the 27th September? A. I don’t remember doing it.

“Q. What do you say? A. I did not do so, I know of.

“Q. Would not you know if you had of? A. I don’t remember.”

Non mi ricordo has never been received with much favour; and I have seldom seen a jury or a Judge give credence to it. Except under extraordinary circumstances, no magistrate would be justified in refusing to convict on such evidence; and, in my opinion, the magistrate acted properly in convicting as he did.

The evidence for the prosecution is assailed because it is the evidence of detectives and not corroborated. But the detective or spy—call him what you will—is in law wholly different from the accomplice. The accomplice is the modern product of evolution from the common law approver, who, being indicted of treason or felony, and arraigned, confessed his guilt before plea pleaded, but said that another was his accomplice in the very same crime, in order to procure his own pardon. The approver might, at the discretion of the Court, be allowed to “appeal” his alleged accomplice: if the alleged accomplice failed on his trial by battle or by the country, the approver was pardoned; if not, the approver was hanged out of hand. It was, therefore, of the utmost importance to the approver that the appellee should be convicted; so at the present time, an accomplice often offers him-

self as "King's evidence;" and, though he has no legal right to a pardon, such as the approver had, his services generally receive recognition. In any but the rarest case, the accomplice expects to benefit by the conviction of the accused. Accordingly the rule has grown up that juries are to be warned that the evidence of accomplices requires corroboration; this is, however, a rule of practice not of law (except in certain cases where the statute is express), and juries may disregard it and convict notwithstanding the absence of corroboration.

But even this rule does not apply to persons who have joined in or even provoked the crime as agents of the police or the authorities, as the ordinary spy or informer. "The case of a pretended confederate, who, as detective, spy, or decoy, associates with the wrongdoers in order to obtain evidence, is distinct from that of an accomplice." Wigmore on Evidence, vol. 3, sec. 2060 (b). Maule, J., in *Regina v. Mullins* (1848), 3 Cox C.C. 526, 7 St. Tr. N.S. 1110, where a spy, who had been employed by the authorities to mix with the Chartists and pretend to aid their designs for the purpose of betraying them, gave evidence on the trial of one of them, said (7 St. Tr. N.S. at p. 1114): "In the case of an accomplice, he acknowledges himself to be a criminal. In the case of these men (spies), they do not acknowledge anything of the kind." And he held that no corroboration was necessary; Wightman, J., who sat with him, must have concurred, as he expressed no dissent.

The same rule was laid down in *Regina v. Dowling*, 3 Cox C.C. 509, by Erle, J. (Williams, J., with him), p. 516: "If he only lent himself to the scheme for the purpose of convicting the guilty, he was a good witness, and his testimony did not require confirmation as that of an accomplice would. . . ." And the same rule is laid down much earlier, in *Rex v. Despard* (1803), 28 How. St. Tr. 346, 489. Many American cases are given in note 9 to sec. 2060, p. 2756, of Wigmore on Evidence, vol. 3. The English cases cited above do not quite cover the present case, as in them the crime was being committed independently of the spy, and he took part in the transaction simply to expose the crime of others.

But the late case of *Rex v. Bickley* (1909), 73 J.P. 239, is directly in point. There the police had reason to believe that the crime of abortion was common in the neighbourhood, and they

App. Div.
1918

REX
v.

McCRANOR.

Riddell, J.

App. Div.
191.
—
REX
v.
McCRANOR.
—
Riddell, J.

suspected the accused of carrying on the business of procuring abortion; they accordingly sent a woman to pretend that she was in need of his assistance. He did unlawfully supply her a noxious thing with the intent to procure her miscarriage; the principal witness against him was this woman, the police spy and *agent provocateur*, and she was not corroborated. He was convicted before Darling, J., who sentenced him to five years' penal servitude. On appeal to the Court of Criminal Appeal it was held by that Court, Darling, Walton, and Pickford, JJ., that there was no need of corroboration—"This woman was a spy . . . sent by the police to the appellant to see whether he would commit the offence which he was subsequently accused of committing." See *Rex v. Baskerville* (1916), 12 Cr. App. R. 81.

An objection was taken that, as it was alleged, evidence that the accused was previously convicted was allowed, before the conviction was made in the present case; but that is an error. The complaint is of the questions on the cross-examination of the accused, which are plainly allowable; see sec. 12 of the Canada Evidence Act, R.S.C. 1906, ch. 145; R.S.O. 1914, ch. 76, sec. 19 (1).

There being no objection to the manner in which the case was conducted, and no necessity for corroboration, I think the District Court Judge was in error in allowing the appeal.

The proceeding before the District Court Judge being an appeal, he had the power to hear evidence; had he done so and given judgment upon the credibility of witnesses before him, we should have paid the utmost respect to his decision. *Beal v. Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, is only one of many cases laying down the same rule. But he did not do so, and he should have dealt with the case as an appellate Court deals with a case which comes up before it on the reported evidence. And, if he found that the magistrate had sufficient evidence upon which to base his decision, he should not have reversed it. We are informed that the learned Judge had seen these witnesses before him in another case and did not believe them in that case: that is his right, and to determine their credibility in that case was his duty. But he may not import any feeling or prejudice into another case—*falsus in uno, falsus in omnibus*, is often a most misleading maxim. Our law will not allow a witness's credit to be attacked

by proof that he had been disbelieved in another case, or even that he had sworn falsely in another case. If the learned Judge was to pass upon the credit of the witnesses in the present case adversely, he should have heard them and given them an opportunity of rehabilitating themselves in his good opinion. It is to my mind wholly unjudicial and of the worst tendency to import into one case an opinion on anything but law formed in another.

But in any case we are in quite as good a position as the Judge; and, in my opinion, the magistrate was wholly right in convicting.

We have nothing to do with the justice or otherwise of the law: that is made for us and our duty is to obey it loyally. *Lex dura forsitan, sed lex.* I have, however, little sympathy with a man who deliberately breaks the law for his own pecuniary advantage; who, in sheer greed of gain, seeks by breaking the law to obtain an advantage over his law-abiding neighbour.

I would allow the appeal with costs throughout.

LATCHFORD, J.:—At the close of the argument at Bar, the only point on which I was in doubt was as to whether the appeal was properly before the Court. This doubt having been removed, I am of the opinion that, without hearing additional evidence, it was not open to the learned District Court Judge to reverse the decision of the magistrate, based as it was on evidence which the magistrate credited, and which, as credited, amply warrants the conviction originally made.

The appeal should, therefore, be allowed with costs here and below.

SUTHERLAND, J.:—On the 9th October, 1917, an information was laid against James McCranor, the keeper of the Avenue Hotel in the city of Fort William, for unlawfully selling intoxicating liquor. He appeared before the magistrate on the 11th, was remanded until the 19th, and again remanded until the 26th day of that month, when he was tried and convicted.

Thereafter, having admitted to the magistrate that this was a second offence, he was sentenced to 6 months' imprisonment.

The Ontario Temperance Act, 1916, 6 Geo. V. ch. 50, sec. 92 (2), (9), makes provision for an appeal to the Judge of a District Court.

App. Div.
1918
—
REX
v.
McCranor.
—
Riddell, J.

App. Div.
1918

—
REX

v.

McCRANOR.

—
Sutherland, J.

The accused appealed from the said conviction to the Judge of the District Court of Thunder Bay, who, on the 1st March, 1918, quashed the conviction. This appeal is from the order quashing the conviction.

By sec. 94 (1) of the said Act, an appeal by the inspector or other prosecutor is given to a Divisional Court of the Appellate Division of the Supreme Court of Ontario from the decision of the Judge of a District Court in any case "arising out of or under this Act . . . in which the Attorney-General of Ontario certifies that he is of opinion that the matters in dispute are of sufficient importance to justify an appeal;" and sub-sec. 2 of the said section provides that notice of the intention to appeal, where the certificate of the Attorney-General is necessary and is obtained, may be given within 15 days after the judgment, decision, or order appealed from has been made.

On the 7th March, the Attorney-General for Ontario gave a written certificate. In compliance with sec. 94 (1), a notice of appeal was given within the 15 days mentioned in sub-sec. 2. It was argued that the appeal was not set down promptly, or within the proper time. The disposition of the appeal was apparently delayed from time to time, partly to suit the convenience of counsel, and partly owing to delay in the papers in the case coming forward. It was competent for us to extend the time for setting down the appeal, if it were not set down in time, and I think it would be appropriate to do so.

The evidence called in support of the charge was that of two special officers or "whisky detectives," employed by the Liquor License Department of the Province to travel about from place to place in connection with suspected or alleged violations of the Ontario Temperance Act. One of these, Alexander Correan, who had been thus employed for about 9 years, testified that, on the date named in the information, he had bought a bottle of Scotch whisky from the accused in the hotel mentioned, and had paid to him therefor the sum of \$3. The other detective, Albert Barnett, testified that he was with Correan on the date named and saw him purchase from the accused the bottle of liquor.

The accused gave evidence on his own behalf, and among other things testified as follows.—

"Q. You are the proprietor of the Avenue Hotel? A. Yes.

"Q. You have heard what these men say about selling that bottle of whisky on Thursday the 27th September? A. I don't remember doing it.

"Q. What do you say? A. I didn't do so, I know of.

"Q. Would not you know if you had of? A. I don't remember

App. Div.
1918

REX

v.

McCranor.

Sutherland, J.

"Q. Did you ever have any conversation with Correan at all, the first witness? A. Never.

"Q. You never had any conversation with him? A. Never that I remember of; I seen him at the end of the bar in the evening

"Q. You heard what Correan said, that you sold him a bottle of liquor? A. I say I never remember selling him that bottle of liquor."

The magistrate, in giving judgment, said:—

"I would certainly be very pleased if I could find it in my heart to doubt these men; it would suit me very well, and I only wish I had some doubts in the matter: I would certainly give the prisoner the benefit of the doubt. The fact of the matter is, while it may be unpleasant, something I don't like to do, we are not here to do just as we like. I have nothing to do in this case only to find Mr. McCranor guilty of selling liquor."

It was competent for the District Court Judge, on the appeal, to hear evidence, but this he did not do, and disposed of the case on the evidence on which the magistrate had made the conviction. We are, therefore, in as good a position as he was to determine whether the conviction should stand or be quashed. We were told by counsel for the accused that, in the District Court Judge's reasons for his decision (a copy of which was not filed), he referred to certain discrepancies in the evidence of the two detectives. There are, it is true, some slight and inconsequential discrepancies, not at all sufficient, as it seems to me, seriously to weaken the effect of their consistent evidence on the matter of first importance—the sale and purchase of the whisky. Neither the District Court Judge nor any member of this Court is in as good a position as the magistrate, who saw them, properly to estimate the weight to be attached to their testimony. Though reluctant to convict, he, after seeing and hearing them, had no doubt that he must give due credit to their evidence. After a careful perusal of it, I agree

App. Div.
1918

—
REX
v.

McCRANOR.

Sutherland, J.

with him, and am unable to see how the District Court Judge could properly come to a different conclusion. It was said in argument that he had heard some other case which led him to form an unfavourable opinion as to the credibility of the two detectives, and it was argued that he could properly take judicial notice thereof and allow his judgment in the present case to be influenced or affected thereby. I am unable to agree with this view.

While it is true that Judges may use their general information in arriving at decisions: *Byrne v. Londonderry Tramway Co.*, [1902] 2 I.R. 457, at p. 480; *Hennessy v. Keating*, [1908] 1 I.R. 43, at p. 83; Best on Evidence, 11th ed. (1911), p. 275; they may not properly act on their own private knowledge or belief regarding the particular case, but should dispose of it upon the evidence: Phipson on Evidence, 5th ed. (1911), p. 11.

It was also argued that, as the detectives admitted that they were participants in the illegal sale and purchase, they were accomplices, whose evidence must be corroborated before a conviction based on it alone could be made. No doubt, as a rule, the fact of a witness being an accomplice detracts somewhat, and sometimes substantially, from the credit to be given to his testimony. Judges are in consequence required to warn juries of the danger of convicting on the uncorroborated evidence of an accomplice, though at the same time pointing out to them that they may, nevertheless, convict upon that evidence if they think proper so to do. The rule requiring corroboration in the case of accomplices, however, does not apply to informers, such as, for example, police spies, even though they have instigated, provoked, or joined in a crime.

In *Rex v. Bickley*, 73 J.P. 239, it was held that "a police spy or *agent provocateur* is not an accomplice, and the practice that a jury should not act on the uncorroborated evidence of an accomplice does not apply to the case of such a person." From the facts in that case it appeared that the police had reason to think that the appellant was carrying on the business of procuring abortion, and the charge was for "unlawfully supplying a noxious thing to a woman with the intent to procure her miscarriage." The police had hired as a spy a woman, who went to the accused and was supplied by him with a noxious thing with the intent

referred to, and Walton, J., in delivering the judgment of the Court, said: "But it is clearly established that the evidence of a woman acting as this woman did, is not to be treated as that of an accomplice. See *Regina v. Mullins* (1848), 12 J.P. 776, 3 Cox C.C. 526." And further: "This woman was a spy, and that she acted with the knowledge and approbation of the police was clear from the evidence that was put before the jury. That being so, there is no ground for saying that the jury ought to have been more fully warned as to her evidence."

It is also to be noted that, if corroboration be needed, it may well be found in the evidence of the accused himself. His attempted denial is so halting and hesitating as to amount in the circumstances to a practical admission of the offence. The interval between the date when the offence charged is alleged to have been committed, and the date at which the accusation was brought to his notice, was so comparatively short that it is incredible that he could not remember and testify that he did not sell a bottle of liquor on the day named.

I am of opinion that the appeal should be allowed with costs, including the costs of the appeal from the magistrate to the District Court Judge.

CLUTE, J.:—Appeal from the decision, judgment, or order of the Judge of the District of Thunder Bay made on the 1st day of March, 1918, allowing the appeal of James McCranor against the conviction made against him by William Palling, Esq., Police Magistrate for the City of Fort William, on the 26th October, 1917, for the unlawful sale of liquor at Fort William, on the 27th September, 1917, and quashing the said conviction.

The charge was laid by A. R. Elliott, License Inspector, under the Ontario Temperance Act, 1916, 6 Geo. V. ch. 50. The appeal was taken by A. R. Elliott, the said inspector, pursuant to the fiat, granted in that behalf, of the Attorney-General for the Province of Ontario. Notice of appeal was served on the 15th March, and the appeal was set down on the 4th May, 1918. Objection was taken to the delay in causing the case to be set down for hearing. There was some delay in setting it down owing to the papers being incomplete, and objection was taken to the delay after the case was set down. At the instance of the defendant

App. Div.
1918
—
REX
v.
McCRANOR.
—
Sutherland, J.

App. Div.
1918
—
REX
v.
McCRANOR.
—
Clute, J.

the case was enlarged from time to time. If any undue delay occurred on the part of the appellant in having the case set down, it was waived by the enlargements granted at the defendant's request, without reserving his right to object to the delay, and I do not think the objection can be sustained.

The main question is as to whether or not the District Court Judge is justified in reversing the decision of the magistrate. An appeal to the District Court Judge is given by sec. 92 of the Ontario Temperance Act, sub-secs. 2, 9.

"The practice and procedure upon such appeals, and all the proceedings thereon, shall thenceforth be governed by the Ontario Summary Convictions Act, so far as the same is not inconsistent with this Act" (sub-sec. 9).

The appeal to this Court is under sec. 94, whereby an appeal is given where the Attorney-General for Ontario certifies that he is of opinion that the matters in dispute are of sufficient importance to justify an appeal (sub-sec. 1).

The appeal "shall be had upon notice thereof to be given . . . of the intention to appeal within 8 days, or where the certificate of the Attorney-General is necessary, and is obtained, within 15 days after such judgment . . ." (sub-sec. 2).

"The Clerk of the County or District Court shall certify the judgment, conviction, orders and all other proceedings, to the proper officer of the Supreme Court, at Toronto, for use upon the appeal" (sub-sec. 3).

"The Divisional Court shall thereupon hear and determine the appeal . . ." (sub-sec. 4).

No other practice is indicated.

The prisoner was found guilty before the magistrate, and a previous conviction under the Act was admitted, whereupon he was sentenced to imprisonment for 6 months.

There were two witnesses called for the Crown—Alexander Correan and Albert Barnett.

Alexander Correan, an Armenian, stated that on the morning of the 27th September, 1917, about 11 a.m., in company with Albert Barnett, another officer of the Department, he purchased a bottle of whisky for \$3 from the accused; this was corroborated by the other detective, Albert Barnett.

On cross-examination, Correan said that he came from Turkish Armenia about 18 years ago. He came to Quebec, went to the

States for a while, and returned to Canada. He had been engaged for 9 years "spotting" under the Liquor License Act.

Albert Barnett, who had been engaged for about 8 months as a liquor detective, corroborated the evidence of Correan as to the purchase of the bottle of whisky.

Luke Leonard was the only witness called by the defence. He said: "I saw Correan on Sunday evening, and said to him. 'Will you have a glass of beer?' Correan said: 'No, I am feeling tough; you can appreciate it, bar-tender, when a fellow is hitting it up; he cannot drink this 2 per cent.' He said, 'Give me a drink.' I said, 'I don't believe there is such a thing in the house.' This was on Sunday the 23rd."

At the close of the evidence, the magistrate said:—

"I would certainly be very pleased if I could find it in my heart to doubt these men; it would suit me very well, and I only wish I had some doubts in the matter: I would certainly give the prisoner the benefit of the doubt. The fact of the matter is, while it may be unpleasant, something I don't like to do, we are not here to do just as we like. I have nothing to do in this case only to find Mr. McCranor guilty of selling liquor."

Thereupon McCranor was asked if he had been convicted of haying liquor on his premises, to which McCranor answered, "Yes." He was thereupon sentenced to 6 months' imprisonment.

The appeal was heard by the District Court Judge on the 1st March, 1918, and the conviction quashed. No further evidence was called. Upon the argument it appeared from the judgment of the District Court Judge that he did not believe the evidence of the two detectives called by the Crown, and this was the ground upon which he set aside the conviction of the magistrate. No further evidence was given, nor were the witnesses who testified before the magistrate further examined.

It was suggested by Mr. Bain that the District Court Judge, a day or two before the decision in this case, had heard evidence given by the Crown witnesses Correan and Barnett in another liquor case, and that from hearing their evidence he did not believe them.

I think it clear that the evidence in the former case cannot be imported into the present case; but, at the same time, that does not preclude the District Court Judge from disbelieving these

App. Div.
1918

REX
v.

McCranor.

Clute, J.

App. Div.
1918
—
REX
v.
McCRANOR.
—
Clute, J.

witnesses. The evidence given by these witnesses in the other case, though not admissible, did not prevent the District Court Judge from forming an opinion of their character; and, if he did not believe them truthful or trustworthy, I do not see how he could free himself from that belief in a consideration of the present case.

Though not a rule of law, it is a rule of practice to require corroboration of the evidence of the accomplice: *In re Meunier*, [1894] 2 Q.B. 415, at p. 418. Where a prisoner is convicted upon the uncorroborated evidence of an accomplice the Court of Criminal Appeal may quash the conviction if the Judge at the trial omitted to caution the jury against convicting upon such evidence: *Rex v. Tate*, [1908] 2 K.B. 680. Lord Alverstone, C.J., agreed with counsel for the Crown that there is no definite rule of law that a prisoner cannot be convicted on the uncorroborated evidence of an accomplice, and approved of what Cave, J., said in *In re Meunier*, but thought he should have added, "assuming that the jury was cautioned in accordance with the ordinary practice," and was of the opinion that it is of the highest importance that the jury should be so directed. He quotes Taylor on Evidence, 10th ed., p. 688, as giving a correct statement of the practice, and Russell on Crimes, 6th ed., vol. 3, p. 646, "that the practice in question has obtained so much sanction from legal authority, that it 'deserves all the reverence of the law,' and a deviation from it in any particular case would be justly considered of questionable propriety."

In the *Tate* case the Judge did not direct the jury in accordance with the settled practice, but told them that the question for them was which of the two witnesses they believed, the boy or the prisoner, thereby leading them to suppose that if they believed the accomplice's story they might properly convict, although his evidence was entirely without corroboration. Under these circumstances, the Court of Criminal Appeal was of the opinion that there had been a miscarriage of justice, and that the conviction should be set aside.

Lord Alverstone adds: "We should not, however, have taken this view, notwithstanding the Judge's departure from the practice, if we thought that there was in fact substantial corroboration upon the evidence." But, in their opinion, there was no such corroboration.

There was no corroboration in the present case, and it is said that this was not necessary, as detectives are not to be considered as accomplices. It is so stated by Phipson, 4th ed., p. 471, but no authority is given for the statement. Corroboration must be by independent evidence. It is not sufficient by another accomplice: *Rex v. Noakes* (1832), 5 C. & P. 326.

Referring to the disclosures which are made by informers, to the Government, the magistracy, or the police, as privileged communications, the rule is, “. . . that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed; if it can be made appear that really and truly it is necessary to the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it:” *per* Eyre, C.J., in *Roscoe’s Criminal Evidence*, 13th ed., p. 131.

The weight of American authorities is given in 16 *Corpus Juris*, pp. 955, 956:—

“An instruction which expresses or intimates an opinion as to the degree of credit or weight to be given to the testimony of a detective, a policeman, or an informer is erroneous, as where it charges that such testimony should be received with great, or more than ordinary, caution or with distrust, or with extreme care and suspicion. But this rule is not invaded by an instruction that the jury may consider the manner of a detective in testifying, or his interest in the case, or that it is legitimate for the State to employ detectives to run down crime, or that greater care should be used than in other cases, but that the testimony should not be disregarded entirely, and that the jury are the sole judges of the credibility of all the witnesses.”

See *The State v. Fullerton* (1901), 90 Mo. App. 411 (holding that where the sole evidence on the trial of an indictment for selling liquor comes from detectives, the defendant is entitled to an instruction that such evidence should be received with the greatest caution). Compare *O’Grady v. The People* (1908), 42 Colo. 312, 346 (holding that the giving of instructions as to the caution to be observed in weighing testimony of private detectives or persons employed to find evidence is based upon rules of practice rather than of law, and rests largely in the discretion of the trial Judge).

App. Div.
1918

REX
v.
McCRANOR.

Clute, J.

There is one class of persons, apparently accomplices, to whom the rule requiring corroborative evidence does not apply, namely, persons who have entered into communication with conspirators, but who, in consequence of either a subsequent repentance or an original determination to frustrate the enterprise, have disclosed the conspiracy to the public authorities, under whose direction they continue to act with their guilty confederates, till the matter can be so far matured as to insure their conviction: Taylor on Evidence, 9th ed., sec. 971; *Rex v. Despard*, 28 How. St. Tr. 346, 489, *per* Lord Ellenborough. The law in this respect is the same in America. Greenleaf on Evidence, 16th ed., sec. 382: *Campbell v. The Commonwealth* (1877), 84 Penn. St. 187, 198.

It was held in *Commonwealth v. Downing* (1855), 4 Gray (Mass.) 29, that one who purchases intoxicating liquor, sold contrary to law, for the express purpose of prosecuting the seller for unlawful sale, is not an accomplice, and is a competent witness on the trial of the seller; but the jury should be instructed to receive his evidence with the greatest caution and distrust. Still, a refusal of the presiding Judge so to instruct, accompanied with a remark upon the necessity of sometimes resorting to such evidence, was held not a ground of exception. See also *Commonwealth v. Willard* (1839), 22 Pick. (Mass.) 476.

There appears to be very little authority in our own Courts or in England on the exact question herein involved, but the weight of authority is in favour of the view that an informer or detective, as in this case, is not an accomplice, and does not, therefore, strictly speaking, require corroboration; but where, as in this case, the complainant and witness invites the accused to commit the offence, his evidence should, I think, be examined with extreme care and caution, whether by Judge or jury; and, in the absence of any corroborative evidence, it is a question as to what weight, if any, should be given to it.

The District Court Judge hearing the appeal did not believe the detectives upon whose sole evidence the conviction was made, there being no corroboration.

I do not feel justified in reversing his decision. If, as is probably the case, he was possessed of such opinion from having seen and heard the witnesses, it is difficult to see how he could denude himself of that opinion upon reviewing the evidence in this case,

nor do I think he should; at all events it is not for this Court, I think, to reverse his finding and judgment.

I would dismiss the appeal, protect the magistrate as far as this Court has power to do so, and give no costs.

App. Div.
1918

REX
v.
McCRANOR.

Clute, J.

MULOCK, C.J.Ex., agreed with CLUTE, J.

Appeal allowed (MULOCK, C.J.Ex., and CLUTE, J., dissenting).

[APPELLATE DIVISION.]

1918

MCCALLUM v. COHOE.

Dec. 21.

Husband and Wife—Liability of Wife on Promissory Note and Agreement Signed for Benefit of Husband—Duress—Threat of Prosecution—Implied Promise not to Prosecute—Agency of Stranger for Person in whose Favour Note and Agreement Made—Finding of Trial Judge—Knowledge—Ratification—Estoppel—Evidence—Appeal—Undue Influence of Husband—Want of Independent Advice—Onus—Consideration—Pleading—Amendment—Practice—Omission to Call Attention to Claim upon Agreement in Settling Judgment of Trial Judge—Correction upon Appeal—Costs.

The judgment of FALCONBRIDGE, C.J.K.B., 42 O.L.R. 595, was reversed, and judgment was given against the defendant Martha C. for the amount which she agreed to pay the plaintiff, and directing the execution by both defendants of two mortgages in favour of the plaintiff which they had agreed to give.

It was *held*, that the defendant Martha C., the wife of the other defendant, was not entitled to succeed upon any of the defences raised by her, viz.: duress on the part of the plaintiff; undue influence of her husband and absence of independent advice; and no consideration.

In the opinion of the majority of the Court, there was no evidence that, in procuring the signing of the promissory note for \$1,500 by the wife, one M., the manager of a bank, acted as the plaintiff's agent. M. not having been the plaintiff's agent to obtain the note, the plaintiff was not affected by any duress which M. may have exercised upon the wife; and the validity of the note could not be affected by the subsequent disclosure to the plaintiff that the wife had been induced to sign the note by the representation made by M. that the plaintiff "was going to have Mr. C. arrested if he did not settle."

Per RIDDELL, J.—The trial Judge might well, upon the evidence, have found M. to be the agent of the plaintiff, on the ground that the plaintiff must have intended the natural result of his action, must have expected that the threat would be communicated to the wife and used to induce her to sign the note—the plaintiff might be disbelieved where his evidence was not consistent with the natural consequences of his conduct. But the trial Judge accepted the plaintiff's evidence, and put the finding of agency on another ground. A person does not become a principal by any act of so-called ratification unless at the time of the contract the so-called agent was not acting for himself but was intending to bind an ascertainable principal: *Wilson v. Tummon* (1843), 12 L.J.C.P. 306; *Marsh v. Joseph*, [1897] 1 Ch. 213; even if it is intended that some unnamed principal shall benefit, if the so-called agent purports to be acting for himself and not for

App. Div.
1918
—
McCALLUM
v.
CÓHOE.

another, the rule applies: *Keighley Maxsted & Co. v. Durant*, [1901] A.C. 24. It is not the law that one taking an advantage obtained by a wrong must be held to have ratified the wrong: *Eastern Construction Co. Limited v. National Trust Co. Limited*, [1914] A.C. 197. There could be no pretence of agency by estoppel in this case; and the wife could not succeed upon the defence that M. was the plaintiff's agent.

The note was obtained under an implied promise not to prosecute; but, upon the evidence, it could not be said that it had been proved that the plaintiff knew when he took the note and the agreement that they had been obtained by the implied promise.

Per Curiam.—The onus was on the wife to establish the defence of undue influence and want of independent advice, based upon the facts that she was a married woman and the transaction was for the benefit of her husband. Undue influence by her husband was not proved, but was disproved.

Hutchinson v. Standard Bank of Canada (1917), 39 O.L.R. 286, followed.

Per MULOCK, C.J.Ex. (SUTHERLAND and KELLY, JJ., concurring).—The wife agreed to sign the note if the plaintiff would agree to extend the payment over three years, and that constituted valuable consideration.

The note was intended to operate as security that the husband would pay the amount of his liability, limited to \$1,500, when ascertained by arbitrators; the plaintiff should have based his claim on the note as well as the submission and award, and should have leave so to amend his statement of claim.

Per RIDDELL, J.—It is a vicious and inexcusable practice for a party, who finds one of his claims not dealt with, to enter judgment without reference to such claim and without the attention of the trial Judge being called to the omission. The plaintiff's claim for a direction to the defendants to execute two mortgages as security for the balance would have been given effect to in the judgment of the trial Judge if attention had been called to it on settling the judgment. It should not have been necessary to make it the subject of appeal; and, while the appellate Court might correct the error, it would not favour the practice, by way of costs or otherwise.

AN appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., 42 O.L.R. 595, in so far as the judgment dismissed the action as against the defendant Martha Cohoe, and in so far as it failed to require the defendants to execute two mortgages.

October 16 and 17. The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and KELLY, JJ.

G. N. Shaver, for the appellant. The statement made by McLachlin is not to be attributed to the appellant in any way. McLachlin was not the appellant's agent. The mere absence of independent advice is not sufficient to set the impeached document aside. *Hutchinson v. Standard Bank of Canada* (1917), 39 O.L.R. 286, 36 D.L.R. 378, cited by the learned trial Judge, was decided on a different point. As regards the defence of no consideration, the case is on all fours with *Macdonald v. Fox* (1917), 39 O.L.R. 261, 35 D.L.R. 198. He also referred to *Alliance Bank v. Broom* (1864), 2 Dr. & Sm. 289, cited in Anson on Contract, 14th ed., p. 106. The only defence left is that of duress on the part of the

appellant. The onus of establishing such a defence rests on the defendants, and it has not been met. The alleged threat, used by McLachlin, must be attributable to the appellant, in order that the defence may succeed. The defendants fail to establish this, and also fail as regards the other defences pleaded. [Counsel was stopped.]

J. W. Payne, for the defendants, the respondents, argued that the case had been rightly decided by the learned trial Judge on the law and the facts, and that the judgment should not be disturbed. He referred to *Peoples' Bank of Halifax v. Johnson* (1892), 20 Can. S.C.R. 541, 545. The fair inference from the facts and circumstances of the case is that McLachlin acted as the appellant's agent in bringing about the arrangement in connection with which the note was given. The real consideration was that which was present to the minds of the parties, and that was undoubtedly the object of preventing a criminal prosecution. It was all one transaction, and the duress lasted throughout. He also referred to *Fairweather v. McCullough* (1918), 43 O.L.R. 299, 43 D.L.R. 525.

Shaver, in reply, argued that the *Peoples' Bank* case and the *Fairweather* case were distinguishable from the case at bar. He referred to *McClatchie v. Haslam* (1891), 65 L.T.R. 691, as presenting practically the same facts as this case; also to *William Whiteley Limited v. The King* (1909), 101 L.T.R. 741, and to Halsbury's Laws of England, vol. 7, para. 735, and cases there cited. The judgment should have directed the respondents to execute two mortgages, as they agreed to do.

December 21. MULOCK, C.J.Ex.:—This is an appeal from the judgment of the Chief Justice of the King's Bench, who dismissed the action. The action was brought against Harry G. Cohoe and his wife, Martha K. Cohoe, to recover \$500 and for a mandatory injunction directing them to execute and deliver to the plaintiff a mortgage of certain real estate as security for \$1,000 and interest.

There is, I think, no conflict of evidence which affects the issues. The material facts are as follows:—

The plaintiff, who resided at Burford and there carried on a partnership business under the name of the Burford Coal and Grain Company, entered into an agreement with the defendant

App. Div.
1918
McCALLUM
v.
COHOE.

App. Div.
1918
McCALLUM
v.
COHOE.
Mulock, C.J.Ex.

Harry G. Cohoe, who resided at Norwich, whereby the latter agreed to buy wheat on commission for the plaintiff, and was to be entitled to draw on the plaintiff from time to time, through the branch of the Royal Bank at Norwich, for funds wherewith to purchase the wheat. Mr. McLachlin was the manager of this branch, and the plaintiff's firm, the Burford Coal and Grain Company, guaranteed payment to the bank of Cohoe's drafts on the plaintiff.

Cohoe was also personally a customer of the Norwich branch of the bank. Under this agreement Cohoe purchased considerable quantities of wheat for the plaintiff, drawing upon him through the Norwich bank from time to time for funds, and these drafts were duly met by the plaintiff. The bank-account in respect of these transactions was kept in Cohoe's name. In December, 1917, the plaintiff discovered that Cohoe was short in his delivery of wheat, and pressed Cohoe for payment of the deficiency. The extent of Cohoe's indebtedness to the plaintiff was uncertain, owing to Cohoe not having kept accurate accounts, and during the plaintiff's investigations as to the state of the account he discovered that Cohoe, contrary to his agreement with the plaintiff, was also buying grain on his own account. He also ascertained that certain real estate which Cohoe had told the plaintiff was his own was his wife's.

The plaintiff made frequent efforts to secure a settlement of the indebtedness, the amount of which was uncertain. The plaintiff, however, told Cohoe that, in his (the plaintiff's) opinion, it much exceeded \$1,500, but that he would accept that amount in full satisfaction, and Cohoe made promises of payment on account, which, however, he did not keep, and at last the plaintiff, knowing that Cohoe was a customer of the Norwich bank and thinking that Mr. McLachlin was familiar with Cohoe's dealings, called upon McLachlin with a view to ascertaining Cohoe's financial position and obtaining a settlement. During the conversation that ensued the plaintiff made reference to a possible criminal prosecution against Cohoe. McLachlin and he differ as to the precise words used, but they were such as to cause McLachlin to think that, unless there was a settlement, Cohoe would probably be prosecuted criminally. McLachlin at this interview expressed his belief that Cohoe would settle, and the plaintiff then suggested

an appointment with Cohoe at the bank; shortly afterwards, such a meeting took place, the plaintiff, McLachlin, and Cohoe being present. After a conversation in regard to the matters in question, the plaintiff said to Cohoe as follows: "I will limit your liability to \$1,500. You put up a note signed by Mrs. Cohoe and yourself, depositing it with Mr. McLachlin, and we will choose a board of arbitrators of three; make your own choice, right in Norwich, and I will submit my books to them, you submit yours to them, and their finding is final. If they find you owe me only \$600, we will take \$600. If they find you owe me \$2,400, I will make the limit \$1,500 to shew that I want to settle;" and at this interview the plaintiff expressed a willingness to allow two years for payment. On the following day, McLachlin went to the home of Mr. and Mrs. Cohoe and discussed the matter with them. Mrs. Cohoe at first was unwilling to sign the proposed note, and Mr. McLachlin then informed her that the plaintiff "was going to have Mr. Cohoe arrested if he did not settle." Mrs. Cohoe then appeared greatly troubled, and her husband said to her: "You need not sign that if you don't want to; do not sign on my account." She said, "I am placed in the position where I can hardly do otherwise." After some further conversation, she said: "Well, call up Mr. McCallum and see if he will extend the time of payment for the \$1,000 over three years, and I will sign." Cohoe then called up Mr. McCallum on the telephone, and McLachlin then told him that Mrs. Cohoe was willing to sign, provided that payment of the \$1,000 was extended over a term of three years, and the plaintiff agreed to such extension, whereupon she signed the note in question, being the joint and several note of herself and her husband for \$1,500, payable to the order of the plaintiff, and delivered the same to Mr. McLachlin, who took it away with him. At this interview McLachlin referred to the proposed arbitration proceedings, whereby Cohoe was to have two years in which to pay the \$1,000; and it was, no doubt, well understood by Mrs. Cohoe and her husband at the time of the giving of this note that arbitrators were to be appointed to determine the amount owing by Cohoe, and that it was to be a term of the arbitration that \$500 was to be paid in cash and the remaining \$1,000 within three years. McLachlin explained how it happened that he went to the Cohoes. He emphatically denied having been sent there by

App. Div.
1918

McCALLUM

v.

COHOE.

Mulock, C.J.Ex.

App. Div.
1918
—
McCALLUM
v.
COHOE.
—
Mulock, C.J. Ex.

McCallum or that he was McCallum's agent in the matter. He said: "Mr. Cohoe had been engaged to purchase grain and produce for him (the plaintiff), and Mr. McCallum supplied us with a letter of guarantee saying he would accept all Cohoe's drafts on presentation, and Mr. Cohoe had independent transactions outside of the grain that he was supposed to buy for McCallum; and he claims that, as there was a loss in connection with Cohoe's business, the bank was responsible for those losses on account of holding that letter of guarantee, that we should not have had independent transactions with him."

"Q. Is that why you were interested in getting the thing settled? A. Yes."

In furtherance of the understanding between all the parties, the plaintiff and defendant, by instrument under seal, submitted it to three arbitrators to determine the amount of Cohoe's indebtedness to the plaintiff, and that submission contains the following recital: "Whereas the parties hereto of the first part" (that is, Mr. and Mrs. Cohoe) "have delivered to J. R. McLachlin, as aforesaid, their promissory note in favour of the party of the second part" (that is, the plaintiff) "for the sum of \$1,500, to be held by him and disposed of as is hereinafter set forth;" and the submission, among other things, provides as follows:—

"Should the said arbitrators or the majority of them find and declare that the parties of the first part" (the defendants) "or either of them is or are indebted to the party of the second part in a greater amount than the sum of \$1,500, the party of the second part" (the plaintiff) "agrees to accept the sum of \$1,500 in full satisfaction of the indebtedness of the parties of the first part."

"Should the said arbitrators or a majority of them find and declare that the parties of the first part" (the defendants) "or either of them are or is indebted to the party of the second part" (the plaintiff), "such indebtedness shall be paid in the following manner:" then follows a provision that, to the extent of \$500 of the indebtedness, the amount shall be paid at once, and, as to any excess over the \$500, the same is to be paid in three yearly instalments, and that in neither circumstance shall the defendant Cohoe be required to pay more than \$1,500. The submission also provides for the defendants giving a mortgage of all their real estate as security for the amount found due.

The arbitrators found the defendant Cohoe indebted to the plaintiff in the sum of \$1,826.18, which, because of the agreement, they reduced to \$1,500.

Mrs. Cohoe's defences are: (a) duress on the part of the plaintiff; (b) undue influence of her husband and the absence of independent advice; (c) no consideration for the note.

There is no evidence that, in procuring the note from Mrs. Cohoe, McLachlin acted as the plaintiff's agent. On the contrary, the evidence clearly established the absence of agency. McLachlin knew that Mrs. Cohoe's joining in the note would save the bank from any claim by the plaintiff, and his intervention was solely in the interests of the bank. As said in *Leake on Contracts*, 6th ed. (Canadian notes), p. 285, duress, to affect a contract, "must be the act of the party himself, or imposed with his knowledge and taken advantage of by him, for the purpose of obtaining the agreement; duress by a third person would not avoid a contract made with a party who is not cognizant of it: 1 Rolle, Abr. 688."

It was not until several days after the note had been given to McLachlin for the plaintiff that the latter learned of what occurred at the Cohoe house which induced Mrs. Cohoe to sign the note. In his reasons for judgment, the learned trial Judge, who did not find agency, said (42 O.L.R. at p. 597): "The plaintiff, after receiving this information, never repudiated or disavowed the transaction. I think that under these circumstances McLachlin was an agent so as to bring the case within the rule." The moment the note was delivered to McLachlin, it became the property of the plaintiff, and the contract between the plaintiff and Mrs. Cohoe was then complete. McLachlin not having been the plaintiff's agent to obtain the note, the plaintiff was not affected by any duress which he may have exercised upon Mrs. Cohoe; and I am unable to understand how his subsequently ascertaining from McLachlin the circumstances of the interview can affect the validity of the note, which up to that time was, I think, unassailable. Thus, in my opinion, the defence of duress fails.

As to that of undue influence by the husband and the absence of independent advice, the onus was on Mrs. Cohoe to establish that defence: *Hutchinson v. Standard Bank of Canada*, 39 O.L.R. 286, 36 D.L.R. 378. This she has not attempted to do, nor could

App. Div.
1918

McCALLUM

v.

COHOE.

Mulock, C.J.Ex.

App. Div.
1918

McCALLUM
v.

COHOE.

Mulock, C.J.Ex.

she hope to establish it, for her husband told her before she signed the note: "You need not sign that if you don't want to; do not sign on my account."

As to the defence of no consideration: Mrs. Cohoe agreed to sign the note if the plaintiff would agree to extend the payment over three years, and he agreed to do so, and this constituted valuable consideration.

The note was intended to operate as collateral security that the husband would pay the amount of his liability, limited to \$1,500, when ascertained by the arbitrators; the plaintiff should have based his claim on the note as well as the submission and award, and should have leave so to amend his statement of claim.

For these reasons, I think the appeal should be allowed and the judgment set aside and judgment be entered for the plaintiff for \$500 and ordering the defendants to execute and deliver to the plaintiff a mortgage as claimed in the statement of claim; the plaintiff to be entitled to costs throughout, including those of this appeal.

SUTHERLAND and KELLY, JJ., agreed with MULOCK, C.J.Ex.

RIDDELL, J.:—An appeal by the plaintiff from the judgment of the Chief Justice of the King's Bench so far as it relieves the defendant Martha K. Cohoe from liability and fails to order the defendants to execute certain mortgages.

The plaintiff, residing at Burford, is a member of the Burford Coal and Grain Company, which carries on business, *inter alia*, as a grain buyer. Cohoe, living at Norwich, was employed by the plaintiff to buy wheat on a commission of 2 cents per bushel. The financial arrangement is not quite clear—that Cohoe was to pay for the grain is certain: that he was to draw upon the plaintiff or his company for what he needed is also certain; but whether he was to draw in advance and apply that money in buying grain, or whether he was to pay for the grain first and then draw for his disbursements, is not clear. The plaintiff, in order that Cohoe might be certain of receiving the proper amount of money, had McLachlin, manager of the Norwich branch of the Royal Bank (which was Cohoe's bank), guarantee that drafts drawn from time to time by Cohoe on the plaintiff's company for the purpose of buying produce, would be accepted.

In December, Cohoe fell behind; he drew over \$50,000, but the price of the grain he had bought and forwarded fell considerably short of the amount sent him. The plaintiff went north and saw him at Dublin, Ontario, charged him with being \$4,800 short; and they finally went together to Norwich. They checked over their accounts, and, after examining the cars at various places, they seem to have come to the conclusion that there was a shortage of about \$2,400. There was some talk about Cohoe paying \$2,000: the plaintiff inquired about his property and Cohoe told him the property was in his own name. Cohoe failed to pay the \$2,000; the plaintiff got suspicious and searched the title to Cohoe's property, finding it in Mrs. Cohoe's name.

Apparently he then went to McLachlin "with a view of getting settlement with Mr. Cohoe . . . because he was Mr. Cohoe's banker."

The evidence as to the time of this interview at the hotel in Norwich is confused and perhaps conflicting, and it may be that this interview took place before the plaintiff saw Cohoe about the accounts; I do not think the particular time is material.

The plaintiff had apparently the thought that he had a claim against McLachlin's bank; he told McLachlin that if the matter were not settled he intended to bring an action against the bank as well as against Cohoe.

The plaintiff had his solicitor working on the case, and had in his mind the possibility of taking criminal proceedings against Cohoe: he told McLachlin (according to McLachlin) that, unless Cohoe settled, he was going to have Cohoe arrested. As the plaintiff puts it, he did not say so in so many words, but, "I said there was a possibility of criminal action being taken against Mr. Cohoe," "criminal proceedings might be taken," this was when "simply discussing the account and a possibility of a settlement, going over it carefully."

McLachlin said, "I think Mr. Cohoe will settle;" the plaintiff said, "Make an appointment," and "we made an appointment in Mr. McLachlin's office . . . Norwich . . . in the bank."

The three met in McLachlin's office; the plaintiff accused Cohoe of not keeping his agreement and said: "If you will give me evidence of good faith that you will stay, you put me up a note of \$1,500; I will limit your liability to \$1,500, because with

App. Div.
1918

McCALLUM
v.

COHOE.

Riddell, J.

App. Div.
1918

McCALLUM
v.
COHOE.

Riddell, J.

the \$950 mortgage on it \$1,500 is about all that it is worth . . . that is, the property" (referring to the real property which he had found to be in the name of Mrs. Cohoe with a mortgage upon it of \$950).

From the evidence of McLachlin it is clear that the note for \$1,500 was to be signed by both Mr. and Mrs. Cohoe.

It was agreed that the liability of Cohoe should be determined by three named arbitrators, McLachlin being one of them, but that the amount should in no case exceed \$1,500. Nothing was said at the time about Mrs. Cohoe being a party to the arbitration.

The note was not drawn up at that time, nor was a submission to arbitration, the arbitration being conditional on the note being furnished. Then the plaintiff left McLachlin and Cohoe—again quoting McLachlin's evidence, "he left, and he said he must have that security as an evidence of good faith that Mr. Cohoe would go on with the arbitration.

"Q. And was it agreed to? A. Yes, and he wanted that arranged at once.

"Q. Mr. McCallum wanted it arranged at once? A. Yes, that is, the security must be given at once; and he went home and he left it over till noon of the following day.

"Q. That is to sign the note? A. Yes."

The following morning, the 11th January, 1918, McLachlin went to see Mrs. Cohoe; she hesitated about signing the note, and finally said she would not sign. McLachlin says: "I saw that she was not going to sign, so I says, 'I may tell you this, that Mr. McCallum told me he was going to have Mr. Cohoe arrested if he did not settle.' Well, she appeared greatly troubled and worried about it, and Mr. Cohoe said: 'You need not sign that if you don't want to; do not sign on my account.' . . . I just simply made the statement, that is all. So she said—Mr. Cohoe said, 'You do not need to sign that on my account.' She said, 'I am placed in the position where I can hardly do otherwise,' and she said, 'I wish I could see the boys so I would know what to do.' . . . I thought at the time she meant Mr. Cohoe's brothers. Perhaps she meant her own brothers; I do not know; I did not ask them; and so finally, after some deliberation, she said: 'Well, call up Mr. McCallum and see if he will extend the time of payment for the \$1,000 over three years, and I will sign.'

"Q. What was the original agreement? A. Two years.

"Q. You left her then? A. No.

"Q. They have a 'phone in the house? A. Yes. Mr. Cohoe sent in the call and I talked with Mr. McCallum and told him that Mrs. Cohoe was willing to sign providing the \$1,000 was extended over a term of three years, and I made the remark at the time that it was a very serious thing for her to sign; and he agreed to that; he agreed to extending the terms of the payment, and she signed the note, and I came away."

Mrs. Cohoe's account is not materially different; she but makes assurance doubly sure that she was frightened into signing the note: "Mr. McLachlin told me that Mr. McCallum said that Mr. Cohoe would be arrested if I did not sign it.

"Q. Who were present at that time? A. Mr. Cohoe and Mr. McLachlin.

"Q. And yourself? A. Yes, just the three of us.

"Q. Why did you sign it? A. Because I was frightened into it.

"Q. In what way? A. I did not want Mr. Cohoe arrested. He said if I did not sign it that he would arrest him.

"Q. Did anybody advise you at all? A. No.

"Q. Any lawyer? A. No.

"Q. Anybody else? A. No, no one."

Mr. McLachlin said: "I don't want to make you angry, but Mr. McCallum told me if you did not sign that note he would arrest your husband." The note, the essential prerequisite, being thus obtained, McLachlin set about the arbitration: he went to the bank's solicitor, told him that Mr. and Mrs. Cohoe had signed a note which he (McLachlin) was holding, and that it had been agreed that the whole matter should be submitted to arbitration. The solicitor drew up an agreement for arbitration, making Mrs. Cohoe a party along with her husband and a co-covenantor with him for the payment of the amount to be found due. This was signed by Mr. Cohoe and handed to him for his wife's signature.

Her account—the only account in evidence—is as follows:—

"Q. How did you come to sign the arbitration papers? A. I would have signed anything after I signed the \$1,500—it would not have made any difference.

"Q. Was it read over and explained to you by anybody, the arbitration papers, I mean? A. No, it was not.

Ap p. Div.
1918

McCALLUM
v.
COHOE.
Riddell, J.

App. Div.
1918

McCALLUM
v.

COHOE.

Riddell, J.

"Q. I think your husband took it out and got you to sign it?
A. He did not get me to sign it; I signed it myself.

"Q. Did he ask you to sign it? A. No, he did not. He said
I could do as I liked about it.

"Q. But you did sign it? A. Yes, I signed it.

His Lordship: "You had no legal advice about this at all?
A. No. No explanation by anybody.

Q. As you say, you would have signed anything? A. Yes, I
would have."

The arbitration had in the meantime been going on; before its conclusion the agreement had been executed; the result was to find Cohoe indebted to the amount of some \$1,800; but, as the plaintiff had agreed to limit his claim to \$1,500, the award was made for that sum. The agreement of the 23rd January, 1918, provided for \$500 cash and the remainder to be secured by second and third mortgages—nothing has been paid and no mortgage given.

McLachlin says he was not sent by the plaintiff to get the note signed, and was not the plaintiff's agent in obtaining it—the plaintiff agrees. It seems that the plaintiff did not know of the statements made to Mrs. Cohoe until a few days after.

Cohoe having failed to pay the \$500, this action was commenced, by a writ issued on the 26th January, against him and Mrs. Cohoe, founded on the agreement of the 23rd January. About the same time, McLachlin told the plaintiff how the note had been procured. The plaintiff says:—

"Q. Did he" (i.e., McLachlin) "tell you on any of those occasions after getting the note signed that he informed Mrs. Cohoe that you intended to institute criminal proceedings against her husband if she did not sign the note? A. No, he did not put it that way. He said, 'I told her there was a possibility.'

"Q. And he told you he had told Mrs. Cohoe that before she signed the notes? A. He said he just mentioned it."

McLachlin's account is substantially the same:—

"Q. And, after you got the note signed, did you at another time see McCallum in regard to getting the note? A. Yes.

"Q. Did you tell him what you had said to Mrs. Cohoe? A. Yes, in a general way I did.

"Q. What did you tell him? A. I told him that in the first

place she said she would sign for \$500, and that I told her that that would not be acceptable to Mr. McCallum, and finally that I had made the statement to her and to Mr. Cohoe that Mr. McCallum had said to me that if he did not settle he would have him arrested.

"Q. And you said that to Mr. McCallum afterwards? A. Yes, I did."

The action was tried before the Chief Justice of the King's Bench at Woodstock, in March, 1918. Judgment was given against Cohoe for \$500, interest, and costs, but the action as against Mrs. Cohoe was dismissed with costs.

As against Cohoe it is contended by the plaintiff that there should also have been a mandatory injunction directing him to execute the mortgages as security for the balance as provided for by the agreement. This seems to have been a mere oversight; on the settling of the judgment the attention of the learned Chief Justice should have been called to the omission, and, no doubt, he would have made the correction. It is a wholly vicious and inexcusable practice for a party, who finds any of his claims not dealt with, to enter judgment without reference to such claim and without the attention of the trial Judge being called to the omission. While it cannot be said that the Appellate Division will not on appeal correct the error, no favour should be shewn to such a slovenly practice, by way of costs or otherwise. The claim of the plaintiff should have been allowed; and, no doubt, the learned Chief Justice would have allowed it had his attention been called to it in settling the judgment.

The judgment should be amended accordingly, but no costs should be given on that branch of the appeal.

The substantial defence is on the part of the female defendant—"I was frightened into it;" and it was to prevent the arrest and prosecution of her husband on a criminal charge.

There can be no doubt, I think, that, if these instruments had been obtained by McCallum himself or by his agent, under the circumstances they would have been voidable; and that was conceded by Mr. Shaver in his able and logical argument.

It is said, however, that McLachlin was not the agent of the plaintiff in the transaction, and therefore the acts of McLachlin will not affect the plaintiff.

App. Div.
1918
McCALLUM
v.
COHOE.

Riddell, J.

App. Div.
1918
McCALLUM
v.
COHOE.
Riddell, J.

It is elementary that a contract procured between A. and B. through fraud of C. is not thereby voided if C. have no relation to A. or B. It is obvious that A. cannot be allowed to rescind his contract with B. because he has been induced to enter into it by some fraud of C. to which B. is no party: *Smith's Case* (1867), L.R. 2 Ch. 604, at p. 616, *per* Lord Cairns; *Sturge v. Starr* (1833), 2 My. & K. 195; *Wheelton v. Hardisty* (1857), 8 E. & B. 232 (the last an exceedingly interesting as well as a "very important, complicated and difficult case," as Lord Campbell calls it); *Masters v. Ibberson* (1849), 8 C.B. 100; *Pulsford v. Richards* (1853), 17 Beav. 87; *Burnes v. Pennell* (1849), 2 H.L.C. 497; *Barnett v. South London Tramways Co.* (1867), 18 Q.B.D. 815.

And, even if the primary wrongdoer is an agent, if the fraud be perpetrated by the agent for his own advantage without the knowledge of the master, the contract is not necessarily void: *Union Bank v. Munster* (1887), 37 Ch.D. 51.

I think that there is ample evidence upon which a trial tribunal, Judge or jury, could find that the plaintiff made McLachlin his agent to procure the notes and to make the threat—here the plaintiff, a creditor, a business man, when negotiating with a banker who, in a sense, represents his debtor, informs the banker that he will prosecute unless the matter is settled. He is told by the banker that when he, the banker, was arranging the settlement, he was at Mrs. Cohoe's house—and a few days afterwards he is told by the banker that he has communicated the threat to Mrs. Cohoe.

Taking these facts in connection with all the other facts of the case, the learned trial Judge might well have found McLachlin the agent of the plaintiff, on the ground that the plaintiff must have intended the natural result of his action, must have expected that the threat would be communicated to Mrs. Cohoe and would be used to induce her to sign the required note—in other words, the plaintiff might be disbelieved where his evidence was not consistent with the natural consequences of his conduct.

It is recognised even in the criminal law that it is "an universal principle, that when a man is charged with doing an act, of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act:" *per* Lord Ellenborough, C.J., in *Rex v. Dixon* (1814), 3 M. & S. 11,

at p. 15. Of course the doctrine must not be carried so far as to compel a Court to find intent as a matter of law where the evidence is convincing that the intent did not exist: *Ex p. Mercer* (1886), 17 Q.B.D. 290, which cleared up what it had been supposed followed from *Freeman v. Pope* (1870), L.R. 5 Ch. 538.

Had the learned Chief Justice put his finding of agency on some such ground, I do not think it could be disturbed.

But that does not seem to be the ground upon which the finding of agency proceeds—there is no discrediting of the plaintiff: his story seems to be accepted at its face value, and it is said (42 O.L.R. at p. 597): “McLachlin, on cross-examination, says that he told the plaintiff afterwards what he had told Mrs. Cohoe about his intention to arrest her husband. The plaintiff, after receiving this information, never repudiated or disavowed the transaction. I think that under these circumstances McLachlin was an agent so as to bring the case within the rule.”

It is clear law that one who desires to become a principal, or whom it is desired to charge as a principal, does not become a principal by any act of so-called ratification unless at the time of the contract the so-called agent was not acting for himself but was intending to bind an ascertainable principal: *Wilson v. Tummon* (1843), 12 L.J.C.P. 306; *Marsh v. Joseph*, [1897] 1 Ch. 213; even if he intended that some unnamed principal shall benefit, if the so-called agent purports to be acting for himself and not for another, the rule applies: *Keighley Maxsted & Co. v. Durant*, [1901] A.C. 240 (which case is of great value as getting rid of some loose expressions in the cases).

The once somewhat prevalent idea that one taking an advantage obtained by a wrong etc. must be held to have ratified the wrong has received its quietus by *Eastern Construction Co. Limited v. National Trust Co. Limited*, [1914] A.C. 197, 15 D.L.R. 755.

There can be no pretence of agency by estoppel in the present case.

I do not think that Mrs. Cohoe can succeed on the ground that the banker was the agent of the plaintiff. This, however, by no means disposes of the case.

Here there is more than fraud, there is a threat of a criminal prosecution. “If the note be not signed, McCallum will arrest your husband,” to my mind clearly implies, “If the note be

App. Div.
1918
McCALLUM
v.
COHOE.
Riddell, J.

App. Div.
1918

McCALLUM
v.

COHOE.

Riddell, J.

signed, he will not," and the case comes within *Williams v. Bayley* (1866), L.R. 1 H.L. 200; *Brook v. Hook* (1871), L.R. 6 Ex. 89, an implied agreement not to prosecute.

"There is a distinction between getting a security for a debt from the debtor himself and getting it from a third person who is under no obligation to the creditor:" *per* Cotton, L.J., in *Flower v. Sadler* (1882), 10 Q.B.D. 572, at p. 576—and it seems to me the note was obtained under an implied promise not to prosecute.

Where this is the case, and the security is obtained by a third party, the test is, "Did the contractee at the time he accepted the contract know that he was getting it by reason of the (non-debtor) contractor fearing the prosecution of the debtor?" *Jones v. Merionethshire Permanent Benefit Building Society*, [1891] 2 Ch. 587, at p. 598, affirmed in [1892] 1 Ch. 173: see especially *per* Lindley, L.J., at p. 183; because it is well established that "it is not the law that, if a lady makes a sacrifice to get her husband out of a scrape, she can necessarily impeach the security which she gives, even although the result is to 'stifle a prosecution:'" *per* Lindley, L.J., in *McClatchie v. Haslam*, 65 L.T.R. 691, at p. 693.

There is enough in the evidence, I think, to justify the trial Judge in so finding, but he has not so found, as we have seen. He has held the plaintiff responsible on the ground that, when he received the "information, he never repudiated or disavowed the transaction," and "under these circumstances McLachlin was an agent so as to bring the case within the rule."

I have read and re-read the evidence, and am unable to say that it has been proved that the plaintiff knew when he took the note and the agreement that they had been obtained by the implied agreement not to prosecute.

It seems to me that in order to find it we must disbelieve the plaintiff, who swears that he had not intended McLachlin to repeat it, that he did not make the threat with the object of forcing a settlement, that he did not know till some days afterwards that the threat had been communicated. McLachlin's evidence is *pro tanto* corroborative. I do not think we can find the plaintiff's knowledge as a fact, and accordingly it follows that this defence is not made out.

It remains to consider the defence based upon the facts that Mrs. Cohoe is a married woman and the transaction was for the

benefit of her husband. The proposition that a married woman should be treated differently by the law from any one else is a relic of the times when she was almost a nullity in the eye of the law, the husband and wife were one, and the husband was that one. Equity took charge of her as though she were a babe and protected her from the legitimate consequences of her own acts. How long and how far these equitable principles are to prevail in the wholly changed conception of the capacity of a married woman is for the Legislature; how far in the present state of the law she is protected is for the Courts. And for the present purpose the law has been recently and authoritatively laid down by the Appellate Division in *Hutchinson v. Standard Bank of Canada*, 39 O.L.R. 286, 36 D.L.R. 378—this we are bound to follow. The law there laid down is that in “a transaction between husband and wife for the benefit of the husband, there is no presumption of undue influence, and no burden is cast on the person sustaining such a transaction to prove that the wife had independent advice; on the contrary, it lies upon the person attacking the transaction to prove affirmatively undue influence by the husband and knowledge thereof by the creditor:” see *Euclid Avenue Trusts Co. v. Hobs* (1911), 24 O.L.R. 447, and cases cited. Here not only was undue influence by the husband not proved: it was disproved. “Mr. Cohoe said to his wife not to sign it on his account” (p. 31 of the notes of evidence). Pressure there undoubtedly was, but that was pressure not by the husband or by the plaintiff but by McLachlin, who was anxious to have the note signed in order that the arbitration might go on, and his bank be free from an action at the suit of the plaintiff; and, as we have seen, the plaintiff did not know of that pressure until after he had received the note and had entered into an agreement on the strength of receiving the note by which he deprived himself of the right to recover more than \$1,500 out of a claim which he thought was about \$2,400, and which turned out in fact to be \$1,800.

This defence also fails.

It will be seen that I have considered the agreement sued on and the note as parts of the one transaction, as Mrs. Cohoe makes them, and as I think they were; but, if the agreement sued on be considered as a separate and independent transaction, the defendant's position is not strengthened, but rather the reverse.

App. Div.
1918
McCALLUM
v.
COHOE.
Riddell, J.

App. Div.

1918

McCALLUM

v.

COHOE.

Riddell, J.

I would allow the appeal against Mrs. Cohoe and direct the same judgment to be entered against her (in the same terms as against her husband) with costs of action and appeal.

Appeal allowed.

[APPELLATE DIVISION.]

1918

Dec. 23.

FLEMING v. TOWN OF SANDWICH.

Municipal Corporations—Opening Street through Land Owned by Plaintiff—Local Improvement Work Initiated by Town Council under sec. 9 of Local Improvement Act—Assessment of Cost—By-law Differing from Notice Given under sec. 11—Necessity for Strict Compliance with Statutory Requirements—Invalidity of By-law and Assessment—Remedy by Appeal to Court of Revision under sec. 36.

Where a municipal by-law and an assessment under it purport to be made in pursuance of a statute, the statutory provisions must be strictly complied with, in the sense that non-observance of any of them is fatal.

Re Hodgins and City of Toronto (1909), 1 O.W.N. 31, approved.

In re Gillespie and City of Toronto (1892), 19 A.R. 713 (affirmed by the Supreme Court of Canada, *City of Toronto v. Gillespie* (1893), *Coutlee's Digest*, cols. 873, 874), followed.

A prerequisite to the valid passing of a by-law under the Local Improvement Act, R.S.O. 1914, ch. 193, is publication of notice of the council's intention, under sec. 11.

Re Kemp and City of Toronto (1915), 21 D.L.R. 833, 835, approved.

Where the notice differed from the by-law and assessment made under it in the amount of money which the town corporation must pay and in the amount which the land-owner principally affected must pay in respect of a work (the opening of a street through his land) initiated by the town council as a local improvement under sec. 9 of the Act, the by-law and assessment were set aside.

Under sec. 36 (1) the Court of Revision has jurisdiction to "review the proposed special assessment and to correct the same" as to certain specified matters; but that section does not debar an interested person from making a claim that the proceeding is invalid; and sub-sec. 2 removes any ground for the contention that the remedy of such a person is by appeal to the Court of Revision.

AN appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., at the trial at Sandwich, dismissing the action.

The nature of the plaintiff's claim appears from the statement of claim as follows:—

1. The plaintiff is the owner of certain lands and premises within the limits of the defendant corporation, being part of what is known as the Indian Reserve.

2. In November, 1916, the defendant corporation proceeded to extend the highway known as Peter street, in the said town of Sandwich, across the lands of the plaintiff from Detroit street

to what is known as the 33rd foot road allowance, according to a plan numbered 54, and, on or about the 13th November, obtained from the township engineer what was alleged to be a report under the Local Improvement Act, R.S.O. 1914, ch. 193, the Act under which the proposed work was to be undertaken.

3. In pursuance of the proposal of the council, the corporation caused to be published a notice under sec. 9 of the said Act, in which it was stated that the estimated cost of the work was \$3,450, of which amount the Corporation of Sandwich was to pay the sum of \$2,305.20, and the estimated special rate per foot frontage to be charged against the owners of the property to be assessed was said to be \$1.80⁵/₁₀.

4. On the 20th December, 1916, the council passed by-law No. 667 to authorise the opening and establishment of the Peter street extension, and on the same day passed by-law No. 668 to provide for the expropriation of the land required for such extension.

5. In by-law No. 667 it was recited, among other things, that notice of the intention of the council to undertake such work had been duly published as set out in paragraph 3 hereof.

6. On the 18th October, 1917, the council of the defendant corporation disregarded the alleged report of its engineer, and the notice caused to be published as aforesaid, and passed by-law No. 735 to provide for the payment of a one-third share only of the cost of the opening of Peter street under by-law No. 667, and provided for assessing upon the lands to be benefited the balance of the cost of the proposed work; and, in accordance with such by-law, an assessment was made upon the plaintiff's lands, and the lands of other owners sought to be benefited by the work, and the council proposes to pass a further by-law adopting the said assessment and charging the land in accordance therewith.

7. None of the work contemplated by any of the said by-laws has yet been undertaken.

The plaintiff, therefore, claims:—

1. An order declaring by-law No. 735 and the assessment made in accordance therewith invalid.

2. An injunction restraining the defendant corporation from proceeding to pass a by-law imposing the assessment made by its engineer under the said by-law.

3. An injunction restraining the defendant corporation from

1918
FLEMING
v.
TOWN OF
SANDWICH.

1918

FLEMING

v.

TOWN OF
SANDWICH.

proceeding further with the proposed work under the circumstances disclosed.

4. Such further and other relief as to the said Court may seem meet.

The following provisions of the Local Improvement Act are referred to in the argument and the judgment:—

9. Notwithstanding anything to the contrary contained in this or any other Act or in any by-law of the municipality, where the council determines and by by-law, passed at any general or special meeting by a vote of two-thirds of all the members thereof, declares that it is desirable that the construction of a curbing, pavement, sidewalk, sewer or bridge, or the opening, widening, extending, grading, altering the grade of, diverting or improving a street or the extension of a system of waterworks, should be undertaken as a local improvement, the council may undertake the work without petition, and the owners of the land shall not have the right of petition provided for by section 13.

11. Where it is intended to proceed under sections 5, 9 or 10 the council shall not be deemed to proceed on the initiative plan, but, before passing the by-law for undertaking the work, shall cause notice of its intention, Form 1, to be published.

32. The council may provide for the making of the reports, statements, estimates and special assessment roll mentioned in section 30 and 31 in such manner and by such officer of the corporation or person as the council may deem proper, and may do so by a general by-law applicable to all works or to any class or classes of them or by a by-law applicable to the particular work.

December 10 and 11. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

J. H. Rodd, for the appellant, argued that by-law No. 667 was null and void because the conditions preceding its passage required by sec. 30 of the Local Improvement Act, R.S.O. 1914, ch. 193, had not been complied with. No by-law was passed authorising the engineer's report of the 4th October, 1917, as required by sec. 32. Therefore the report was bad. By-law No. 735 could not stand because there had been no new notice under sec. 11. The assessment had not yet been certified by the clerk, and so the benefit of the saving section, 38, could not be claimed: *In re Gillespie and City of Toronto* (1892), 19 A.R. 713. The by-law and

assessment had been made in pursuance of a statute, and so non-observance of conditions precedent was fatal: *Re Hodgins and City of Toronto* (1909), 1 O.W.N. 31.

John Sale, for the defendants, respondents, contended that, as no plan was registered, there were no cross-streets, and so there was no flankage except at the end. Therefore, the respondents were relieved of their share of taxes on about 600 feet, and that amount should be charged against the appellant. Everything in the case could, however, be dealt with by the Court of Revision under sec. 36. Section 32 does not suggest that a by-law is necessary prior to a report. If a new by-law were necessary, the council could pass one under the provisions of sec. 44, sub-sec. 4.

Rodd, in reply, maintained that the Court of Revision could only deal with the amount of assessment, and not with the proportion. Section 44 was not applicable in the circumstances of this case: *Anderson v. Municipality of South Vancouver* (1911,) 45 Can. S.C.R. 425.

December 23. The judgment of the Court was read by RIDDELL, J.:—This case affords as striking an instance of uncompromising insistence upon strict legal rights and of wholly unnecessary litigation—unnecessary, that is, in the sense of being avoidable with the exercise of a little “give and take” usually associated with common sense—as often occurs in our Courts. But the parties are entitled to the law as we may find it to be, and they claim their rights in that regard.

The plaintiff is a large land-owner in the town of Sandwich, owning, amongst other lands, an irregularly triangular block about 900 by 1200 by 1200 feet in extent—this he intended to subdivide into lots and put the lots on the market. Wellington street came up to about the middle of one side and Peter street to about the middle of another. The defendants desired to connect these two streets by a new street opened across the plaintiff's block—to this the plaintiff had no objection; he would thereby dispose of a certain part of his land and acquire better access to another part. Thereupon the council, on the 11th September, 1916, instructed their solicitor to take steps to effect the scheme—“the land to be expropriated and the cost charged against the adjoining land under the Local Improvement Act;” and on the same day appointed a committee “to meet Mr. Fleming

App. Div.
1918
FLEMING
v.
TOWN OF
SANDWICH.

App. Div.
1918
FLEMING
v.
TOWN OF
SANDWICH.

Riddell, J.

and try to come to some definite understanding." The committee met the plaintiff and came to an understanding with him, which is manifested by a memorandum signed by him and two of the special committee as follows:—

"Town of Sandwich. At the meeting of special committee on the opening of Peter and Detroit streets to Victoria street and Pajot street respectively, Mr. H. O. Fleming, as owner of the property, agrees with the committee that if the town will pay one-third of the cost and the engineer of the town will assess upon property benefited by the opening such further proportion of the cost as he may be able to under the Local Improvement Act, he will take no step to prevent or obstruct the proceedings, and is willing, if the value of the land taken cannot be agreed upon with the town, to accept the result of the arbitration under the Act. Mr. Fleming also expects such flankage rebate in taxation as is usual in the town, subject to approval of the council.

"September 27th, 1916.

Richard McKee.

"H. O. Fleming.

William Wright."

At a subsequent meeting of council the following took place:—

"The report of the committee appointed to interview Mr. H. O. Fleming in reference to the opening of Peter street was read. Mr. Fleming stated that he would like to have the council approve his plan so that the engineer can stake out the lots; that as soon as Detroit street is opened his plan will be registered; that he will give 33 feet so as to have a 66-foot street from Pajot street to Wellington street; and that the triangular portion consisting of lots 84 to 89 he will deed to the town, if the town will purchase 33 feet from him, so as to make the street 66 feet wide from Wellington street to Church street;" and "it was carried that Mr. Fleming's proposed plan be approved, and that his generous offer be accepted."

Pajot street runs into the south-east corner of the block; Wellington street to about the middle of the north-east side; and it was proposed to connect them by a 66-foot street along the north-east side of the block, half the land for which would be given by the plaintiff—the plaintiff also to give a part of the block to the town for a park.

The "flankage" was provided for by a general by-law of the town, No. 386:—

"That, where two sides of corner-lots in the municipality of the

town of Sandwich are liable for assessment for local improvement works, 80 feet of frontage or flankage is hereby exempted from assessment for local improvements, and such allowance or exemption on said 80 feet is hereby assumed as part of the municipality's share of the said works."

App. Div.
1918
FLEMING
v.
TOWN OF
SANDWICH.
Riddell, J.

Without any general or special by-law in the premises, as mentioned in sec. 32 of the Local Improvement Act, R.S.O. 1914, ch. 193, the engineer made an estimate of the cost of opening up the proposed street, estimating it at \$3,450; the estimates were approved; and, as it was intended to proceed under sec. 9 of the Act, a notice of street-opening was published, as required by sec. 11 of that Act. This followed the Form 1 referred to in sec. 11, and given at p. 2572 of the Revised Statutes—the important parts are:—

"2. The estimated cost of the work is \$3,450, of which \$2,305.20 is to be paid by the corporation. The estimated rate per foot frontage is \$1.85⁵/₁₀. The special assessment is to be paid in 25 annual instalments.

"3. A petition against the work will not avail to prevent its construction; but the owners affected may apply to the Ontario Railway and Municipal Board under the conditions provided in the statutes in that behalf."

The amounts mentioned in the notice are arrived at as follows, as appears from the engineer's estimate:—

Total cost estimated at.....	\$3,450.00
Charge the town the $\frac{1}{3}$ of \$3,450.....	\$1,150.00
On abutting frontage (flankage).....	1,155.20(on 640 feet)
<hr/>	
Total.....	\$2,305.20

The remainder of the cost was apportioned thus:—

To the plaintiff on 387 $\frac{2}{3}$ feet, remainder of abutting frontage.....	\$627.80
On non-abutting frontage (other owners).....	517.00
<hr/>	
Add town's share.....	\$1,144.80
<hr/>	
Total cost.....	2,305.20
<hr/>	
Total cost.....	\$3,450.00

App. Div.
1918
FLEMING
v.
TOWN OF
SANDWICH.
Riddell, J.

This scheme suited the plaintiff; he was expected to pay \$627.80; the town, \$2,305.20; and others non-abutting, \$517.00— it will be seen that the notice says nothing of the non-abutting land, as directed by sec. 11, Form 1.

No appeal was taken to the Ontario Railway and Municipal Board; and, on the 20th December, 1916, the town passed a by-law (No. 667) under sec. 9 for opening the new street. There is on objection taken to its form, but it is contended by the plaintiff that the conditions precedent have not been complied with.

The council also passed a by-law for the expropriation of the necessary land. A disagreement took place between the council and Mr. Fleming, through which the plan of subdivision of his block was not registered—the town then said: “There being no registered plan, we have no cross-streets; there is therefore no flankage except at the end;” and proceeded on the 18th October, 1917, to pass a by-law, No. 735, whereby the town was only to pay one-third of the cost and compel the abutting frontage, i.e., the plaintiff, to pay the remainder, except what was assessed against the non-abutting property. The engineer had made a report with a corrected and final estimate, on the 4th October, 1917, placing the whole cost at \$3,556.39.

Of this the town was to pay.....	\$1,185.46	
and 80 feet flankage.....	150.00	
In all.....	\$1,335.46	\$1,335.46
The non-abutting land.....		519.13
leaving the plaintiff to pay.....		1,701.80
In all.....		\$3,556.39

There is no general or special by-law to authorise this report. The result of this proceeding would be that the town would pay \$1,335.46 instead of \$2,505.20, and the plaintiff \$1,701.80 instead of \$627.80—the town gaining \$969.74, the plaintiff losing \$1,074. There was no new notice under sec. 11. Naturally the plaintiff was not satisfied, and he brought this action to set aside by-law No. 735 and the assessment under it, and for consequent relief. The learned Chief Justice of the King’s Bench dismissed the action, and the plaintiff now appeals.

In the view I take of the case, there is no need of considering the reasons—if the so-called reasons can be dignified with the name of “reason”—that the plan was not registered.

The by-law here attacked and the assessment under it purport to be made in pursuance of a statute, and it is well established that in such a case the statutory provisions must be strictly complied with, “in the sense that non-observance of any of them is fatal.” The whole matter is discussed in *Re Hodgins and City of Toronto*, 1 O.W.N. 31, which was believed and rightly believed to lay down elementary law—so much so that the reporter did not print it in the Ontario Law Reports, and the city corporation did not appeal. The cases referred to in that case are conclusive: *Goodison Thresher Co. v. Township of McNab* (1909), 19 O.L.R. 188, at p. 214; *Township of Barton v. City of Hamilton* (1909), 13 O.W.R. 1118, at p. 1131; *In re Gillespie and City of Toronto*, 19 A.R. 713, affirmed in the Supreme Court of Canada on the 1st May, 1893: *City of Toronto v. Gillespie*, Coutlee’s Digest, cols. 873, 874. This last case is wholly in point—the notice differed from the by-law in the work done and times of payment; here the notice differs from the by-law in the amount of money the town (and therefore the owner) must pay—quite as important, to many owners more important.

That a prerequisite to a by-law validly passing is publication of the notice of the council’s intention, under sec. 11, is the opinion of the Ontario Railway and Municipal Board: *Re Kemp and City of Toronto* (1915), 21 D.L.R. 833, at p. 835.

While we need not look at the reason of the rule, it may be observed that, by the council proceeding without a new notice, the plaintiff was deprived of his right to appeal to the Ontario Railway and Municipal Board under (1914) 4 Geo. V. ch. 21, sec. 42, amending sec. 9 of the Local Improvement Act by adding subsecs. 2 and 3.

There are defects in the notice which I do not think it necessary to consider.

The Courts are not becoming more lax in insisting on the requirements of statutes being strictly observed by municipalities—see, for example, *Anderson v. Municipality of South Vancouver*, 45 Can. S.C.R. 425; *MacKay v. City of Toronto* (1917-18), 39 O.L.R. 34, 43 O.L.R. 17, 43 D.L.R. 263; and the recent case in

App. Div.
1918
FLEMING
v.
TOWN OF
SANDWICH.
Riddell, J.

App. Div.
1918.
FLEMING
v.
TOWN OF
SANDWICH.
Riddell, J.

the Supreme Court of Canada, *Grosvenor Street Presbyterian Church v. City of Toronto* (not yet reported) affirming the judgment of the Appellate Division, *Re City of Toronto and Grosvenor Presbyterian Church Trustees* (1917), 41 O.L.R. 352.

It was urged, however, that the matter was for the Court of Revision under sec. 36. I do not think that this section debars one interested from claiming that the proceeding is invalid; but, assuming that there might otherwise be some ground for the argument, it is wholly swept away by sub-sec. 2.*

I am quite aware that the result of setting aside the by-law and the assessment under it may do the plaintiff no financial good in the long run—he claims his legal rights, and he must have them.

I would allow the appeal and grant the prayer of the plaintiff as set out in his statement of claim, with costs here and below. The defendants will probably have no difficulty in discovering the proper procedure to take.

Appeal allowed.

*Section 36 (1) provides that the Court of Revision shall have jurisdiction and power to review the proposed special assessment and to correct the same as to certain specified matters; sub-sec. 2 provides that the Court of Revision shall not have jurisdiction or authority to review or to alter the proportions of the cost of the work which the lands to be specially assessed and the corporation are respectively to bear according to the provisions of the by-law for undertaking the work.

[APPELLATE DIVISION.]

1918
Dec. 23.

RE LABUTE AND TOWNSHIP OF TILBURY NORTH.

Municipal Corporations—Drainage—Complaint of Ratepayer to Township Council as to Want of Repair of Existing Drain—Resolution of Council Requiring Engineer to Make a Survey and Report—Report of Engineer Recommending New Scheme of Work and Assessment—Adoption by Council—Ratification—By-law Passed to Carry Report into Effect—Powers of Council—Municipal Drainage Act, secs. 75, 77.

At a meeting of the municipal council of a township, a ratepayer "complained of the bad state of repair" of a certain drain, and asked the council "that the same be repaired as soon as possible;" and the council, by resolution, instructed the clerk to write to a named engineer "to make a survey of same and report at his earliest convenience." The engineer made a survey accordingly, and made a report to the council in which he treated the work as a new one and varied the assessment. The council adopted the report and passed a by-law to carry it into effect:—

Held, reversing the judgment of the Drainage Referee, that the by-law was not illegal and should not be quashed.

Per RIDDELL, J. :—The adoption of the report was a ratification of the making of the report and therefore equivalent to previous instructions. The Municipal Drainage Act, R.S.O. 1914, ch. 198, does not require a previous express mandate; and the council, having the power to command such a survey and report as were made, had the power to adopt and ratify it.

Sections 75 and 77 of the Act considered.

In drainage and other local matters, the Court should not interfere unless there has been a manifest and indisputable excess of jurisdiction or an undoubted disregard of personal rights.

Gibson v. West Luther (1911), 20 O.W.R. 405, commented on.

Re Johnston and Township of Tilbury East (1911), 25 O.L.R. 242, distinguished.

Re Stephens and Township of Moore (1894), 25 O.R. 600, 605, approved.

1918
RE
LABUTE
AND
TOWNSHIP
OF
TILBURY
NORTH.

AN appeal by the township corporation from an order of the Drainage Referee quashing a drainage by-law passed by the township council on the 8th May, 1918.

The Drainage Referee gave reasons in writing for his order, as follows:—

Before going into the merits of this application, counsel have thought proper to deal with what may be considered preliminary questions, bringing the facts of this case very closely in line with *Gibson v. West Luther* (1911), 20 O.W.R. 405. The Macklem drain was originally a natural watercourse. Somewhere about 1904, under the superintendence of the late Mr. McDonnell, it became a municipal drainage work down as far as the road drain along the concession road into which it had its outlet. Since that time, minor changes have occurred and the concession road drain has been improved under the Municipal Drainage Act, but no work has been done over the course of the Macklem drain proper, unless perhaps (and as to this the evidence is not altogether satisfactory) to divert its course as it reached its outlet, running down the line between Mr. Labute and his neighbour into the concession road drain. The original by-law, report, plans, and specifications appear to have been lost, so that nobody to-day knows what the original assessments were. The resolution under which the present work is proposed to be done instructed Mr. Newman simply to repair the Macklem creek drain. It is unfortunate that the resolution did not go further and give him authority to vary the assessment or treat the work as a new work. He had no data upon which to work, and he has been obliged to treat the scheme as one entirely new. He has not taken into account even the assessments for work done on the concession road drain,

1918
RE
LABUTE
AND
TOWNSHIP
OF
TILBURY
NORTH.

which he now proposes to incorporate as part of the new work. I cannot feel that counsel for the applicant has failed in meeting the onus of shewing this, even if the onus is on him. It seems quite evident that the case is practically in the same position as *Gibson v. West Luther*, and that in proceeding as he did Mr. Newman was without jurisdiction to make the particular report which he has made. I regret very much having to do anything which may result in adding expense to the very small drainage area concerned, because I assume that the council will now give the necessary instructions and that Mr. Newman will make the same report, adopting the work already done; but, as against that, I cannot overlook the fact that the ratepayers concerned (including Mr. Labute) will then have certain rights which would have to-day been lost by reason of the lapse of time if this by-law had been permitted to stand. For example, he complained that the allowance for a bridge was not sufficient. That may or may not be the case. If the by-law has to be passed over again, he will be able to rectify the harm that has been done in that regard, if any has been done. Then the matter has had some publicity, and it is possible that the ratepayers in this small area may not think it advisable to take the risk of proceeding with this report. These things are only possibilities. Mr. Labute is entitled to exercise his legal right, even though the point upon which the matter turns now was not specifically mentioned in his notice. His application to quash, inasmuch as it is one which goes to the jurisdiction, is one which I cannot allow to be overlooked. In the result, the by-law must be quashed with costs; but, in view of the comparatively small drainage scheme, I think these costs should be on the scale of the County Court.

November 13. The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

J. H. Rodd, for the appellant corporation, argued that the by-law should be upheld. The report required of the engineer by resolution of council was of the widest kind, and the council had the right to ask for such a report, whether moved to such a request by a ratepayer or of their own motion: *In re Stonehouse and Plympton* (1897), 24 A.R. 416. The council ratified and adopted the report, which was the same as ordering it: *Tilbury East*

v. *Romney* (1895), 1 Cl. & Sc. 261; *South Dorchester and Dereham v. Malahide* (1895), 1 Cl. & Sc. 275; *Township of Camden v. Town of Dresden and Township of Chatham* (1902), 2 Cl. & Sc. 308; *Re Township of Camden and Town of Dresden* (1903), 2 O.W.R. 200; *Challoner v. Township of Lobo* (1901), 1 O.L.R. 156; *Township of Dover v. Township of Chatham* (1900), 2 Cl. & Sc. 213. There was nothing in the statute preventing the subsequent ratification of the report. The policy of the Legislature is to affirm, if possible, what has been done in matters of this kind: *In re Township of Raleigh and Township of Harwich* (1899), 26 A.R. 313; *Gibson v. West Luther*, 20 O.W.R. 405; *Leslie v. Hill* (1911), 25 O.L.R. 144, 152; *Re Stephens and Township of Moore* (1894), 25 O.R. 600.

O. L. Lewis, K.C., for the respondent, contended that the judgment appealed from was right. The resolution did not give the engineer the right to vary the assessment or treat the work as a new work: *In re Township of Rochester and Township of Mersea (No. 2)* (1901), 2 O.L.R. 435. The council could only act on a report which they had ordered: *Re Johnston and Township of Tilbury East* (1911), 25 O.L.R. 242.

Rodd, in reply.

December 23. RIDDELL, J.:—At a meeting of the Municipal Council of the Township of Tilbury North, in the County of Essex, holden on the 17th September, 1917, the following took place:—

“Mr. Robert Holland complained of the bad state of repair of the Macklem creek drain, and asked the council that the same be repaired as soon as possible.

“Moved by J. B. Lalonde, seconded by J. Mailloux, that the clerk be and is hereby instructed to write engineer Newman to make a survey of same and report at his earliest convenience. Carried.”

The engineer made a survey accordingly, and made a report to the council on the 16th February, 1918, which was adopted by the council, and by-law No. 400 was passed to carry it into effect, on the 18th March (provisionally) and on the 8th May, 1918 (finally). Claude Labute, a land-owner affected by the scheme, moved before the Drainage Referee to quash the by-law; and the Referee made an order, on the 28th June, 1918, quashing it. The township corporation now appeals.

App. Div.
1918
—
RE
LABUTE
AND
TOWNSHIP
OF
TILBURY
NORTH.

App. Div.
1918

RE
LABUTE
AND
TOWNSHIP
OF
TILBURY
NORTH.

Riddell, J.

The Referee proceeded on the narrow and technical ground that the resolution authorised the engineer simply to report a scheme "to repair the Macklem street drain . . . the resolution did not go further and give him authority to vary the assessment or treat the work as a new work;" he followed a case of his own: *Gibson v. West Luther*, 20 O.W.R. 405.

Assuming that this case is good law, I do not think it applies here—there the resolution directed the engineer to act under a certain specified section of the Act, and he acted under another. Here there is no such specific instruction; it is true, a ratepayer complains of the want of repair of the Macklem creek drain, but the resolution is not to have a report on the repair of the drain, but in the widest terms "to make a survey of the same" (i.e., the drain) "and report." The council had the right to require a report of the most extensive character without any petition or complaint from any one: Municipal Drainage Act, R.S.O. 1914, ch. 198, secs. 75, 77;* and there was nothing to prevent them going beyond the complaint of Mr. Holland. It is hard to conceive of a more comprehensive direction than is contained in the resolution. Any complaint that the engineer went beyond his mandate should come from the council: and the council have approved and adopted the report, thereby ratifying and adopting the interpretation by the engineer of his instructions.

*Sections 75 and 77 are, in part, as follows:—

75.—(1) The council of any municipality liable for the maintenance of any drainage work may from time to time as the same requires repairs vary the proportions of assessment for maintenance, on the report and assessment of an engineer appointed by the council to examine and report on the condition of the work, or the portion thereof, as the case may be, which it is the duty of the municipality as aforesaid to maintain and on the liability to contribute of lands and roads which were not assessed for construction, and have become liable for assessment under this Act; and the engineer or surveyor may in his report upon such repairs assess lands and roads in the municipality . . .

77.—(1) Whenever for the better maintenance of any drainage work constructed under the provisions of this Act . . . it is deemed expedient to change the course of such drainage work, or make a new outlet for the whole or any part of the work, or otherwise improve, extend, or alter the work, or to cover the whole or any part of it, the council of the municipality . . . may, without the petition required by section 3, but on the report of an engineer or surveyor appointed by them to examine and report on the same, undertake and complete the change of course, new outlet, improvement, extension, alteration or covering specified in the report, and the engineer or surveyor shall for such change of course, new outlet, improvement, extension, alteration or covering, have all the powers to assess and charge lands and roads in any way liable to assessment under this Act for the expense thereof in the same manner, and to the same extent, by the same proceedings, and subject to the same rights of appeal as are provided with regard to any drainage works constructed under the provisions of this Act. . . .

But I am not prepared to assent to the proposition that, if the engineer has not in advance instructions to report in a particular way on a drain, but does report in that way, or if he is instructed to report under one section and reports under another, then the council must necessarily reject his report—it seems to me to savour of absurdity to say that the council must go through the solemn form—and farce—of passing another resolution, the engineer go away and return with the self-same report, and then the council adopt and act upon it, instead of pursuing the common sense method of adopting the report at once.

The appointment of an engineer may be ratified by the adoption of his report: *Tilbury East v. Romney*, 1 Cl. & Sc. 261, at p. 264; *Township of Camden v. Town of Dresden and Township of Chatham*, 2 Cl. & Sc. 308, 313, 314, affirmed in the Court of Appeal, *Re Township of Camden and Town of Dresden*, 2 O.W.R. 200. And I see no reason why the adoption of his report is not a ratification of his making the report and therefore equivalent to previous instructions. It is a general and elementary maxim of law, *Omnis rati habitio retrahitur et mandato priori æquiparatur*—a subsequent ratification has a retrospective effect and is equivalent to a prior command. The subsequent assent by the mandator to the conduct of his agent undoubtedly exonerates such agent from the consequences of a departure from his orders—the subsequent sanction is considered the same thing in effect as a previous command—the difference being that where the authority is given in advance the party must trust him whom he authorises; if it be given subsequently, the party knows whether everything has been done according to his wishes: *Broom*, Legal Maxims, 8th ed., p. 673; *Maclean v. Dunn* (1828), 4 Bing. 722; *Wilson v. Tumman* (1843), 6 M. & G. 236, 242.

(Of course the ratification can be only of an act which the party had the power to command at the time it was done: *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L.R. 7 H.L. 653. And, equally of course, the ratification will not be effective if the statute requires a previous express mandate.)

It is admitted that the council could command such a survey and report as were made in this case; and I can find nothing in the statute requiring an express direction before the report is made. The council may not act except “on the report of an

App. Div.

1918

RE
LABUTE
AND
TOWNSHIP
OF
TILBURY
NORTH.

Riddell, J.

App. Div.
1918

RE
LABUTE
AND
TOWNSHIP
OF
TILBURY
NORTH.

Riddell, J.

engineer . . . appointed by them to examine and report . . . " (sec. 77 (1)). In the ordinary case this appointment would naturally be made before the examination and report, but there is nothing in the statute requiring it, or excluding the ordinary principles of ratification. The case of *Re Johnston and Township of Tilbury East*, 25 O.L.R. 242, was urged against this view; but there is nothing decided in that case as to the manner in which the employment of the engineer is to be made, or his instructions given, whether by prior mandate or subsequent ratification—the necessity of a report is, indeed, affirmed; but that is not the present point.

The rule to be followed in matters of this kind has been laid down by the late Chancellor in *Re Stephens and Township of Moore*, 25 O.R. 600, at p. 605: "In matters of drainage and other business of local concern the policy of the Legislature is to leave the management largely in the hands of localities, and the Court should be careful to refrain from interference—the meaning of which is always a large outlay for costs—unless there has been a manifest and indisputable excess of jurisdiction or an undoubted disregard of personal rights." If I may say so without presumption, I entirely approve of the rule so laid down, and would add that, when we are succeeding reasonably well in ridding our practice of the law of mere technicalities, it would be intolerable if petty and purely technical defects should be given weight in municipal affairs, which are largely in the hands of laymen.

Where a statute is express, full effect must be given to it; but every statute should, where possible, be interpreted so as to accord with common sense and public utility.

I would allow the appeal and send the case back to the Referee to deal with it on the merits—the respondent should pay the costs of the appeal, all other costs to be dealt with by the Referee.

MULOCK, C.J.Ex., agreed in the result.

CLUTE, J., agreed with RIDDELL, J.

SUTHERLAND, J., agreed in the result.

KELLY, J.:—I am of opinion that in the circumstances of this case the by-law should not have been quashed.

Appeal allowed.

[MIDDLETON, J.]

1918

Dec. 27.

BOSTON LAW BOOK CO. v. CANADA LAW BOOK CO. LIMITED.

Contract—Sale of Set of Law Reports at Fixed Price per Volume—"150 Volumes more or less"—Estimate—Liability of Vendee to Pay for Volumes in Excess of 150.

By a contract in writing between the plaintiffs and defendants, the plaintiffs agreed to give the defendants the sole Canadian market for the "English Reports Reprint," to be published by British publishers, the defendants agreeing to take a certain number of copies "of each volume of the set (150 volumes more or less) at a price of 10s. 6d. per volume." By the plaintiffs' agreement with the publishers, the plaintiffs became agents for the reprint, "to be printed according to the prospectus hereto annexed," and they agreed to take a certain number of "copies of each volume of the reprint as issued" at named prices. The prospectus annexed described the reprint as "a complete reissue of all the decisions . . . in one uniform set of 150 volumes." The volumes were issued from time to time, and when 150 volumes had been issued it was apparent that, to cover the ground, there must be 40 additional volumes or more. The defendants took the position that, having paid for the first 150 volumes at the stipulated price per volume, they were entitled to the additional volumes free of cost:—

Held, that, in the circumstances of the case, the liability must be determined entirely upon the terms of the contract itself; the words in brackets, "150 volumes more or less," did not control and dominate the contract; "150 volumes" was a mere estimate; and the defendants were liable to pay for the additional volumes as issued.

ACTION, upon contract, for the price of 160 copies of volumes 151, 152, 153, and 154 of a law publication, the reprint of the "English Reports." Counterclaim for a declaration that the defendants were not liable to pay for any volumes in excess of 150, and were entitled to all volumes in excess free of cost.

See *Boston Law Book Co. v. Canada Law Book Co. Limited* (1918), 43 O.L.R. 13, 233.

December 2. The action and counterclaim were tried by MIDDLETON, J., without a jury, at a Toronto sittings.

W. N. Tilley, K.C., and *Alfred Bicknell*, for the plaintiffs.

R. T. Harding, for the defendants.

December 27. MIDDLETON, J.:—On the 5th June, 1900, a contract in writing was made between the plaintiffs and defendants by which the plaintiffs agreed to give the defendants the sole Canadian market for the "English Reports Reprint," to be published by William Green & Sons, of Edinburgh, the defendants agreeing to take a certain number of copies "of each volume of the set (150 volumes more or less) at a price of 10s. 6d. per volume."

At the time this contract was made, the plaintiffs had an

Middleton, J.

1918

BOSTON
LAW
BOOK CO.
v.
CANADA
LAW
BOOK CO.
LIMITED.

agreement in contemplation with Messrs. Green & Sons and Stevens & Son for the sole agency for this reprint in the United States and Canada, which eventuated in a formal agreement of the 17th May, 1901. Under this the plaintiffs became agents for the reprint, "to be printed according to the prospectus hereto annexed," and they agreed to take a certain number of "copies of each volume of the reprint as issued" at named prices. "This agreement is to continue until the completion or cessation of the reprint by the publishers."

Annexed to this contract is a circular in which the reprint is described as "a complete reissue of all the decisions of all the English Courts from the earliest date to 1865, in one uniform set of 150 volumes."

In the body of the circular it is said: "It has been found . . . a complete set of all the decisions from the earliest time to 1865 can be given to the profession in about 150 volumes of 1,500 pages each. . . . How this desirable result will be attained is shewn on the specimen page enclosed."

Attached is a list of reports to be covered by the reprint and a specimen page, and there follows a statement shewing the number of volumes approximately in each series, making a total of 150 volumes.

This circular was before the parties to this action as the foundation of the contract made, and may, I think, be referred to as shewing what was meant by the English reprint referred to in the agreement.

When the reprint came to be published, it was found that the number of volumes would exceed the 150.

The following will shew the situation:—

House of Lords.....	Estimated	11	Actual	11	
Privy Council.....	"	6	"	9	Excess 3
Chancery.....	"	23	"	27	" 4
King's (Queen's) Bench..	"	32	"	51	" 19
Rolls Court.....	"	7	"	8	" 1
Vice-Chancellors.....	"	13	"	16	" 3
Common Pleas.....	"	19	"	22	" 3
Exchequer.....	"	12	"	16	" 4
Other series not published	"	27	"	(?)	" (?)
<hr/>					
	"	150	"	160	" 37

In other words, the estimate of 123 volumes for the work so far as it has gone has been exceeded to the extent of 37 volumes, the publication having actually yielded 160 volumes, and if the same proportion holds good for the 27 remaining estimated volumes the actual result will be 192 or 193 volumes, an excess of result over estimate of about one-third.

So far as the Privy Council reports are concerned, there was the inclusion of Moore's Indian Appeals, not covered by the prospectus.

The explanation of the great increase in the number of volumes is found by reference to the number of pages included in a volume. This is shewn in exhibit 6. Instead of a uniform 1,500, the average is 1,296. This alone accounts for over 20 volumes so far. In some of the volumes I have looked at (particularly in the King's Bench series), the number of lines in a page has been reduced. The addition of notes, not contemplated by the prospectus, but of great value to the user, would also be a factor.

When it was found that the number of volumes was going to overrun, there was protest by the defendants and communication with the publishers, but there was no modification of the contract-rights of the parties.

As contemplated by the parties, the defendants have sold to individual customers. These sales were made in the main upon statements similar to the statements in the publishers' prospectus. The contracts differ—in some there is no mention of the number of volumes—in some there is; in some as an approximation and in some as a guaranteed limit, the guaranteed number not being the same in all cases.

The position taken by the defendants is, that they are not liable to pay for any volumes in excess of 150, and are entitled to all volumes in excess free of cost.

When it was ascertained that the series would overrun, there was no repudiation of the contract; indeed that course would have been disastrous to all concerned.

Unfortunately I have before me only the parties to this action, and cannot deal in any way with those really at fault—the publishers. Mr. Tilley presented various theories which might account for some discrepancy between the number estimated and the number produced, but slight investigation has made it plain that this will not account for more than a small fraction of the excess;

Middleton, J.

1918

BOSTON
LAW
BOOK Co.
v.
CANADA
LAW
BOOK Co.
LIMITED.

Middleton, J.

1918

BOSTON
LAW
BOOK CO.
v.
CANADA
LAW
BOOK CO.
LIMITED.

and, so far, I am convinced that there has been on the part of the publishers a deliberate design to increase the number of volumes over the estimate.

The case must be determined entirely upon the terms of the contract itself. That provides that the defendants are to take so many "copies of each volume of the set (150 volumes more or less) at a price of 10s. 6d. per volume."

Unless the words in brackets, giving the number of volumes, control and dominate the contract, the obligation of the defendants to pay is obvious.

After the best consideration I can give the matter, I cannot attribute to them any such potency. The sale was a sale of a certain number of complete sets of the work. A portion of a set would be of comparatively little value. Each party contemplated the complete set being furnished and paid for. The case is in this respect fundamentally different from the sale of a bin of wheat containing 150 bushels more or less. When 150 bushels have been set apart, both that set apart and the residue have their approximate values, and neither is rendered comparatively worthless by reason of its separation from the other.

This is the sale of an essential unity: the trouble is that the price payable for that unity is measured by an arbitrary gauge and is not fixed. This makes it plain that the number of volumes given is an estimate. Neither party to this action could control the action of the publishers, and the fixing the price by the volume, instead of a lump-sum for the set, indicates that payment is to be based upon the actual number of volumes. There is not in the contract any room for the suggestion that the plaintiffs were to supply the volumes beyond 150 free.

When the excess is so large that it might be said to be beyond anything contemplated by the parties, if restitution had been possible, it may be that there was a right of rescission.

If there had been any foundation for an action of deceit, there would have been a claim for damages. These alternatives failing, the contract must govern according to its true interpretation.

The nearest analogy I can think of is a contract to pay for a casting to weigh so much (more or less) at a rate per pound. Had the price been intended to be the result of multiplying the price per pound by the number of pounds estimated, then it would have

been named. The very form of the contract indicates that the weight was a mere estimate and not the governing thing.

In each case the first endeavour must be to ascertain the true subject-matter of the contract. When this is done, the interpretation of the contract becomes comparatively simple.

I can only regret that the parties did not join in an attack upon the publishers, against whom, unless more appears than was developed in the evidence in this case, a remedy ought to be found.

The result is that the plaintiffs are entitled to recover the price of the four volumes in question.

The counterclaim must be dismissed.

Middleton, J.

1918

BOSTON
LAW
BOOK CO.
v.
CANADA
LAW
BOOK CO.
LIMITED.

[APPELLATE DIVISION.]

1918

Dec. 27.

JOHNSON & CAREY CO. v. CANADIAN NORTHERN R.W. CO.

Constitutional Law—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140—Power of Ontario Legislature to Create Lien Effective against Dominion Railway—Action to Enforce Lien—Personal Judgment under sec. 49—Jurisdiction of Court—Charge on Percentage to be Retained by Owner—Sec. 12 (3) of Act—Trial—Jurisdiction of Provincial Officers—Sec. 33 (6 Geo. V. ch. 30, sec. 1)—British North America Act, secs. 92 (14), 96.

A lien claimed under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, cannot exist or be enforced against the property of the Canadian Northern Railway Company, a Dominion company.

Crawford v. Tilden (1907), 14 O.L.R. 572, followed.

Judgment of MASTEN, J., 43 O.L.R. 10, affirmed.

Where the lien claimed cannot be enforced, in an action brought under the Act, against the property sought to be charged, the plaintiff has not the right to proceed to judgment under sec. 49.

Breeze v. Midland R.W. Co. (1879), 26 Gr. 225, *Kendler v. Bernstock* (1915), 33 O.L.R. 351, and *Baines v. Curley* (1916), 38 O.L.R. 301, distinguished.

Judgment of MASTEN, J., on this branch of the case, reversed.

Where there is no lien, there cannot be a charge upon the sum to be retained under sec. 12 (1) of the Act; it is "the lien" which is made a charge upon the fund: sub-sec. 3.

Semble, per RIDDELL, J., that the provisions of sec. 33 of the Act, as enacted by the amending Act 6 Geo. V. ch. 30, sec. 1, are *intra vires*: British North America Act, secs. 92 (14) and 96.

AN appeal by the defendants the Canadian Northern Railway Company and a cross-appeal by the plaintiffs from the judgment of MASTEN, J., 43 O.L.R. 10.

October 2. The appeal and cross-appeal were heard by MULOCK, C.J. Ex., RIDDELL, LATCHFORD, SUTHERLAND, and KELLY, JJ.

App. Div.
1918

JOHNSON &
CAREY CO.
v.
CANADIAN
NORTHERN
R.W. CO.

W. N. Tilley, K.C., and A. J. Reid, K.C., for the defendants the Canadian Northern Railway Company, said that the railway company were appealing against answers given by Masten, J., to questions 2 and 3 set out in his reasons for judgment, and the plaintiffs were cross-appealing against the answer given to question 1. Upon the first question, the Court was bound by the authority of *Crawford v. Tilden* (1907), 14 O.L.R. 572, to decide that a lien claimed under the Mechanics and Wage-Earners Lien Act could not exist or be enforced against the property of a Dominion railway company. The answer to the second question, he submitted, should have been in the negative. The case of *Kendler v. Bernstock* (1915), 33 O.L.R. 351, 22 D.L.R. 475, did not apply, as in the circumstances of that case the plaintiff had a right to a lien in the first place, but in the present case there could be no lien against the lands in question. There was no property to which a lien could attach, or which could be affected by the Act, and so sec. 49 did not apply: *Benson v. Smith & Son* (1916), 37 O.L.R. 257, 31 D.L.R. 416; *Baines v. Curley* (1916), 38 O.L.R. 301, 33 D.L.R. 309. On the question of jurisdiction, counsel urged that the provisions of the Act conferring jurisdiction on the special officers referred to in sec. 33 were *ultra vires*, because the effect of the section was to give these provincial officers the powers of Judges of Superior Courts, and this conflicted with sec. 96 of the British North America Act, which provides that Judges of Superior Courts shall be appointed by the Governor-General in Council: *Hazel v. Lund* (1915), 25 D.L.R. 204; *Colonial Investment and Loan Co. v. Grady* (1915), 31 W.L.R. 575, 24 D.L.R. 176; *Polson Iron Works v. Munns* (1915), 32 W.L.R. 534, 24 D.L.R. 18; *Winnipeg Electric R.W. Co. v. City of Winnipeg*, [1917] 1 W.W.R. 9, 30 D.L.R. 157; *Madden v. Nelson and Fort Sheppard R.W. Co.*, [1899] A.C. 626.

J. R. Cartwright, K.C., for the Attorney-General for Ontario, argued that the provisions of sec. 33 were *intra vires*, and did not conflict with sec. 96 of the British North America Act. He referred to *Regina v. Bush* (1888), 15 O.R. 398; *Re Munro and Downey* (1909), 19 O.L.R. 249; Bacon Abr., vol. 2, p. 626; Lefroy's Legislative Power in Canada, p. 141; Lefroy's Canada's Federal System, pp. 565-567; Clement's Canadian Constitution, p. 511.

A. C. McMaster, for the plaintiffs, contended that the lands in question were surplus lands which the company could dispose of,

and that therefore a lien could attach. He sought to distinguish the *Crawford* case, saying that the decision in that case proceeded on the assumption that there would be no use in establishing a lien against lands which could not be sold under it. Here, these lands, being lands not necessary to the operation of the railway, could be sold by the company under sec. 181 (2) of the Dominion Railway Act. He referred to *Re Clinton Thresher Co.* (1910), 1 O.W.N. 445, 15 O.W.R. 318; *Vokes Hardware Co. v. Grand Trunk R.W. Co.* (1906), 12 O.L.R. 344. He also argued that the lien would attach to the sum to be retained under sec. 12 (1) of the Act. As to the second question, Masten, J., was right in answering it in the affirmative, following the cases referred to by him.

H. S. White, for the defendants Foley Welch & Stewart.

Tilley, in reply, referred to *Breeze v. Midland R.W. Co.* (1879), 26 Gr. 225.

December 27. SUTHERLAND, J.:—An appeal and cross-appeal from the judgment of Masten, J., dated the 23rd April, 1918.

The defendants Foley Welch & Stewart are a copartnership composed of Foley Brothers (a corporation) and Patrick Welch and John W. Stewart. This copartnership entered into a contract in writing with the defendants the Canadian Northern Railway Company to construct a railway line in the Province of Ontario, including filling and constructing a new line of the said railway at Rainy Lake, Ontario, on the division east of Fort Frances, Ontario, of the Canadian Northern Railway, and the plaintiffs, also a corporation, entered into another written contract with the defendants Foley Welch & Stewart, as principal contractors for the filling and construction of the said new line of railway.

The plaintiffs allege that there was no agreement with the defendants, nor with either of them, that the plaintiffs should not be entitled to a lien upon the said lands and railway lines to be constructed thereon for the price of the work and materials to be done and furnished under the said contract. Having done certain work and supplied and furnished materials in the erection and construction of the said railway line and in addition force account and other work, they claimed to be entitled to a lien on the estate and interest of the defendants in the lands and railway line referred to in the statement of claim, and consisting of the railway line in

App. Div.
1918

JOHNSON &
CAREY Co.
v.

CANADIAN
NORTHERN
R.W. Co.

App. Div.
1918

JOHNSON &
CAREY Co.
v.

CANADIAN
NORTHERN
R.W. Co.

Sutherland, J.

question. They accordingly registered a mechanic's lien against the said lands.

In their statement of claim the plaintiffs allege that, by reason of being employed under the said contract, and doing the work and furnishing the materials mentioned therein, they became and were entitled to a lien on the estate and interest of the defendants in the lands referred to under the provisions of the Mechanics and Wage-Earners Lien Act, and that in pursuance thereof they caused to be registered in the registry office for the town of Fort Frances, in the district of Rainy River, a claim to a lien, a copy of which is set out in the statement of claim.

The proceedings were commenced and carried on "In the Supreme Court of Ontario, High Court Division, In the matter of the Mechanics and Wage-Earners Lien Act," and the plaintiffs claim: (1) that the defendants may be ordered to pay the plaintiffs the sum of \$342,033.41, with interest and costs; and (2) that in default of such payment the estate and interest of the defendants in the land and railway lines heretofore mentioned or a component part thereof may be sold and the proceeds applied in and towards the plaintiffs' debt and costs of action pursuant to the said Act.

On motion by the defendants the Canadian Northern Railway Company, an order was made by Middleton, J., dated the 19th June, 1916, directing that "the following questions raised by the defendants the Canadian Northern Railway Company shall be determined before the other questions raised in the action:—

"(a) Can a lien claimed under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, exist or be enforced against the property of the Canadian Northern Railway Company referred to in the amended statement of claim in this action, under the circumstances therein alleged?

"(b) If not, can the plaintiffs proceed to obtain judgment under sec. 49 of the Act, or otherwise in these proceedings?

"(c) Are the provisions of the said Mechanics and Wage-Earners Lien Act conferring jurisdiction on the special officers referred to in sec. 33 of the said Act, *intra vires*?"

This action came on for trial before Masten, J., and by agreement of the parties the taking of evidence was waived, and the action set down for hearing in respect to the questions mentioned, upon the allegations set out in the statement of claim. In his

judgment disposing of the questions which thus came before him (43 O.L.R. 10), the learned trial Judge came to the conclusion that it was impossible to distinguish this case from *Crawford v. Tilden*, 14 O.L.R. 572, and accordingly answered the first of the said questions in the negative.

In the case referred to, it was held that "a lien under the Mechanics and Wage-Earners Lien Act, R.S.O. 1897, ch. 153, cannot be enforced against the railway of a company incorporated under a Dominion Act, and declared thereby to be a company incorporated for the general advantage of Canada."

I think he was right in so holding.

[As to the second question, SUTHERLAND, J., quoted from the judgment of MASTEN, J., the two paragraphs dealing with that question (43 O.L.R. at pp. 11 and 12), and continued:]

In *Kendler v. Bernstock*, 33 O.L.R. 351, 22 D.L.R. 475, Hodgins, J.A., says (33 O.L.R. pp. 353, 354): "If any one affected by the registration of a lien desires to take advantage of the cesser thereof by reason of the provisions of sec. 23, 24, or 25, he may apply *ex parte* under sec. 27, sub-sec. 5, to vacate the registration of the certificate of *lis pendens*; and, if he is successful, the lien itself may be discharged. In such a case there is no trial, and no judgment can be pronounced. But, where the question is left to be tried, the provisions of sec. 49 apply, and a judgment for the amount properly due may be had, although no lien is established."

The prime purpose of the Act in question is to enable a person who has supplied labour or materials to establish a lien and thus acquire authority to sell so as to realise his claim therefor. The lien is one created by the statute and one which was non-existent at common law. In *King v. Alford* (1885), 9 O.R. 643, at p. 647, it was decided that there was "nothing in the scope of the Act as to liens to indicate that it was intended to be operative to a greater extent than as giving a statutory lien issuing in process of execution of efficacy equal to but not greater than that possessed by the ordinary writs of execution."

Under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 6, a general right is given to workmen or materialmen who perform any work or service or furnish any materials to be used in the making, constructing, etc., of any erection, building, railway, etc., to a lien for the price of such work or materials; and

App. Div.
1918

JOHNSON &
CAREY Co.

v.

CANADIAN
NORTHERN
R.W. Co.

Sutherland, J.

App. Div.
1918

JOHNSON &
CAREY Co.

v.

CANADIAN
NORTHERN
R.W. Co.

Sutherland, J.

it is provided by sec. 49 that "where a claimant fails to establish a valid lien he may nevertheless recover a personal judgment against any party to the action for such sum as may appear to be due to him and which he might recover in an action against such party."

The significance to be attached to the word "valid" in the expression "valid lien" is, I think, this: a lien which could under the statute be found to exist in favour of a claimant by reason of the fact that he had performed work or service or furnished materials to be used in the making, constructing, erecting, etc., of any erection, building, railway, etc., which could be legally the subject of a lien under the Act, and which, but for his failure to take the steps and follow the procedure provided in the Act, would have been found to entitle him to a lien. In such case he can still be given the personal judgment mentioned in the section. If he had proceeded regularly under the Act, and been found entitled to his lien, it would have been for the same amount for which the judgment under sec. 49 would be.

It is clear that the lands in question, owned by the defendants the Canadian Northern Railway Company, incorporated under a Dominion Act, are not subject to a lien under the Act in question herein. I am unable to see how it can properly be held that an Act which fundamentally aims at giving a lien to specified classes of persons who may assert and establish claims for work or materials, and who can as a result acquire liens thereon and utilise these to obtain payment of their claims, can be effectively resorted to by any person where the lands from the outset cannot be made legally liable to any lien thereunder.

I am of the opinion that secs. 6 and 49 must, when read together, be construed to refer only to lands, including railway lands, to which the Act can apply, but not to railway lands to which liens can in no case under the Act legally attach.

In *Crawford v. Tilden* (1906), 13 O.L.R. 169, at p. 174, the late Chancellor said:—

"By Dominion statute 4 Edw. VII. ch. 81, the railway in question was incorporated and the undertaking was declared to be by sec. 11 a work for the general advantage of Canada. By the enactment it was brought within the exception as to the local works and undertaking specified in the British North America Act,

sec. 92, sub-sec. 10 (c), and thereby placed under the exclusive legislative authority of Canada by virtue of sec. 91, sub-sec. 29. Being thus a federal railway exclusively under the legislative control of the Dominion, it is not competent for the local legislature of Ontario to enact any law which would derogate from the status and rights and property enjoyed and held by the federal corporation under its constitution created by the Dominion of Canada. That result follows inevitably, I think, from what has been decided in the earlier case of *Bourgoin v. La Compagnie du Chemin de fer de Montreal Ottawa et Occidental* (1880), 5 App. Cas. 381; and the more recent case of *Attorney-General of Canada v. Attorney-General of Ontario*, [1898] A.C. 247; *Canadian Pacific R.W. Co. v. Notre Dame de Bonsecours*, [1899] A.C. 367; *Madden v. Nelson and Fort Sheppard R.W. Co.*, *ib.* 626.

"The Mechanics' Lien Act of Ontario is extended to railway companies as owners and to railways and their lands with the safeguard in sec. 52. 'The provisions of this Act so far as they affect railways under the control of the Dominion of Canada are only intended to apply so far as the legislature of the province has authority or jurisdiction in regard thereto.' This was passed in 1886, after the decision in *King v. Alford* (1885).

"The effect of the legislation is to operate at once upon the property of the railroad affecting it *in rem* and creating a statutory lien on the undertaking for the benefit of the wage-earner. The initial proceeding under the Ontario Act is to place a burden on the lands of the railroad in addition to what may be imposed upon them under the Dominion Railway Act, secs. 111, 112, etc., Act of 1903. That appears to me to be a piece of legislation beyond the competence of the Provincial Legislature."

If the construction to be put upon the Act which I have suggested to be the proper one were not to prevail, a person having a claim for work or material might, as a claimant under the Act, and by asserting that claim thereunder, and in the manner therein provided, even though under no circumstances could he or any other claimant convert a claim into a lien, compel his adversary to fight the claim itself, whatever the amount, in the proceedings thus commenced and before the tribunal provided in the Act, thus depriving him of his right of defence before the usual tribunal, to which otherwise each would be compelled to resort. I cannot

App. Div.
1918

JOHNSON &
CAREY Co.
v.

CANADIAN
NORTHERN
R.W. Co.

Sutherland, J.

App. Div.
1918

JOHNSON &
CAREY CO.
v.

CANADIAN
NORTHERN
R.W. CO.

Sutherland, J.

think that any of the decided cases, or that any expressions of individual Judges therein necessary to the decision of the cases, have gone this length. The trial Judge seems to have thought that the case of *Kendler v. Bernstock*, 33 O.L.R. 351, 22 D.L.R. 475, did, but I am unable to agree with him in this view. The claimant in that case could apparently have established his lien against the property in question but for his failure to take the proceeding which the Act enabled him to take for that purpose. Being, however, a person with a claim such as could properly be asserted against the property in question, and which property could under the Act be legally the subject of a lien, he could avail himself in the proceedings of the benefit of sec. 49, and, notwithstanding his inability to establish a valid lien, recover a personal judgment against a party to the proceeding for such sum as he might have recovered in an ordinary action.

In the present case, under no circumstances could the claimant, or any other claimant, establish under this Act a valid lien against the property in question. In these circumstances, I do not see that the railway company can be legally compelled to fight the claim in question under the statute or be deprived of their right to contest it before the ordinary tribunal.

A further argument advanced on behalf of the plaintiffs was that a charge attached to the percentage required to be retained by the owner under sec. 12 of the Act. But, when sub-sec. 3 of the said section is referred to, it is plain that it is the lien which is to be a charge upon the amount so directed to be retained, and if no lien is established, the section cannot apply so as to aid the claimant.

I would allow the appeal of the railway company as to the section in question, and, doing so, think it is unnecessary to deal with the third question. The appeal should be allowed with costs, and the cross-appeal dismissed with costs.

MULOCK, C.J. Ex., agreed with SUTHERLAND, J.

RIDDELL, J.:—The plaintiffs, sub-contractors for the construction of part of the Canadian Northern Railway, not being paid, took proceedings under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140. Certain preliminary questions were ordered to be tried and determined in advance: Rule 122. These have been

determined by Mr. Justice Masten with divided success. We have now to deal with an appeal and a cross-appeal.

The questions are set out in full in the judgment appealed from.

1. On the first question, i.e., whether a lien claimed under the Act can exist or be enforced against the property of the Canadian Northern Railway (a Dominion railway), referred to in the statement of claim, I entirely agree with my learned brother Masten that we are precluded by binding authority from deciding in the affirmative. In *Crawford v. Tilden*, 14 O.L.R. 572, both the decision and the *ratio decidendi* cover the present case. We are not at liberty to depart from this decision: Judicature Act, R.S.O. 1914, ch. 56, sec. 32. Were the matter open, I should decide in the same way.

2. But it is argued, and my learned brother has held, that, though there can be no lien, the plaintiff may proceed to obtain judgment under sec. 49 of the Act.

This decision is apparently based upon two cases in the Divisional Court: *Kendler v. Bernstock*, 33 O.L.R. 351, 22 D.L.R. 475, and *Baines v. Curley*, 38 O.L.R. 301, 33 D.L.R. 309. I think neither of these cases at all in point.

When examining the language used in a decision, it must always be borne in mind that the Judge is generally not writing a philosophical treatise, in which he would begin by defining his terms accurately, express fully and clearly the exceptions and limitations, etc., etc.; but he is writing on the matter and on the facts submitted to him, and his language must be read in view of the matter and of the facts. These are always to be understood. In saying, "Wherever there is a wrong there is a remedy," he would not need to say expressly, "I do not mean the partition of Poland or the rape of Belgium."

In scores of cases before and since *Quinn v. Leathem*, [1901] A.C. 495, has been said in substance what was said in that case, p. 506, by Lord Halsbury: "Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found."

In neither the *Kendler* nor the *Baines* case was there any

App. Div.
1918

JOHNSON &
CAREY Co.
v.

CANADIAN
NORTHERN
R.W. Co.

Riddell, J.

App. Div.
1918

JOHNSON &
CAREY Co.

v.

CANADIAN
NORTHERN
R.W. Co.

Riddell, J.

question that the property sought to be charged could be affected with a lien under the statute. The substratum, the condition, what was understood and taken for granted in both cases, was the existence of property which could be rightfully charged with the statutory lien.

In *Kendler v. Bernstock*, it was held that sec. 49 meant what it said, and that where a claimant could not establish a valid lien, as his lien had been voided by failure to take proceedings, he might still have a personal judgment. *Baines v. Curley* decided that a lienor, made a party by service upon him of notice of trial, did not lose his lien because the originator of the proceedings failed. In neither case was there any suggestion that a creditor could take proceedings under the Act where the property upon which he claimed a lien could not be subject to a lien at all. As Mr. Justice Hodgins says in the *Kendler* case, 33 O.L.R. at p. 353: In "an action commenced . . . to realise the lien or liens, it becomes a judicial question whether a lien or more than one exists, or whether, by reason either of non-compliance with any of the statutory provisions (see secs. 17, 18, 19, 22, 24, 25) or otherwise, the lien or liens has or have ceased to exist." And the statement in the *Baines* case, 38 O.L.R. at p. 305, that "any person claiming a lien can commence the action," is not to be extended to cover the case of one claiming a lien upon property upon which a lien cannot by law attach—"the generality of the expressions are . . . governed . . . by the particular facts of the case." *Quinn v. Leathem*, [1901] A.C. at p. 506.

The point, then, being free from authority, I have no doubt that the procedure of the Act cannot be applied to the case.

The whole object of the Act is to insure the payment for work and materials, if necessary, out of property upon which work has been done or materials provided, and that by a cheap and expeditious method. "The substance of the enactment is the sale:" *per* Meredith, J.A. (now C.J.C.P.), in *Crawford v. Tilden*, 14 O.L.R. at p. 577 (*ad fin.*); and the procedure has been from time to time simplified in order to facilitate the enforcement of the lien by sale as quickly and cheaply as possible.

What is now sec. 49 of the Act was introduced by the Mechanics and Wage-Earners Lien Act, 1896, 59 Vict. ch. 35, sec. 48, allowing a personal judgment to be given where any claimant should fail to

establish a valid lien "in an action brought under the provisions of this Act." The trifling change in terminology effected by the Mechanics and Wage-Earners Lien Act, 1910, 10 Edw. VII. ch. 69, sec. 49, does not change or affect the meaning. I think it obvious that there must be property which can be affected under the Act, and a lien attach under the Act, before the action can be said to be brought under the provisions of the Act, and that the change made in 1910 was never intended to change the manner of trial of cases where, from the nature of the property, there could be no lien. The only effect of the section in either statute, as it seems to me, is to permit a personal judgment where "by reason either of non-compliance with any of the statutory provisions (see secs. 17, 18, 19, 22, 24, 25) or otherwise, the lien . . . has . . . ceased to exist:" *Kendler v. Bernstock*, 33 O.L.R. at p. 353.

Otherwise the result would be that a claimant having an account for labour or materials need only allege a lien, set up a claim for a lien in any case, and deprive the person against whom he claimed of the right to trial of the case in the usual way.

The case of *Breeze v. Midland R.W. Co.*, 26 Gr. 225, might at first sight seem opposed to this view. A bill was filed to enforce a mechanic's lien for work done upon the defendants' station-house; it was taken *pro confesso*, and Blake, V.-C., said: "I do not think that you are entitled to that relief as against the land of a railway company required for the purpose of their railway. The only decree I can make is one for the payment of the amount due, with costs." But at that time the practice was under the Mechanics Lien Act, R.S.O. 1877, ch. 120, sec. 13, a continuation of the first Act, 1873, 36 Vict. ch. 27, sec. 6, and (1874) 38 Vict. ch. 20, sec. 11, and that provided that in cases other than those within the jurisdiction of the County or Division Court the claim was to be realised in the Court of Chancery according to the ordinary procedure of that Court. The bill filed, no doubt, set out the work done for the defendants, non-payment, that the work was done on the station-house, etc., and claimed payment, the enforcement of the lien claimed by sale, and such further or other relief, etc., etc. This came up for hearing in the usual practice of the Court, and on the statements contained in the bill the Court ordered payment, but declined to enforce the supposed lien. There was no special form

App. Div.
1918

JOHNSON &
CAREY Co.

v.
CANADIAN
NORTHERN
R.W. Co.

Riddell, J.

App. Div.
1918

JOHNSON &
CAREY Co.

v.

CANADIAN
NORTHERN
R.W. Co.

Riddell, J.

and nothing different from the proceedings in the case of any other kind of lien. This is no authority for saying that where the claimant cannot have a lien from the nature of the property he may still have his personal claim tried by the special tribunal provided for trials of cases of liens.

King v. Alford, 9 O.R. 643, was a precisely similar case. This was under the Mechanics Lien Act, R.S.O. 1887, ch. 126, sec. 13, in the same words as (1873) 36 Vict. ch. 27, sec. 6, and the amending Act of 1874, 38 Vict. ch. 20, sec. 11. The change to the present practice was introduced by the Act of 1896, 59 Vict. ch. 35, sec. 29. How careful Courts have been in allowing such claims in derogation of the common law may be seen in such cases as *Trask v. Searle* (1876), 121 Mass. 229.

It is argued, however, that a lien or charge attaches to the sum to be retained under sec. 12 (1) of the Act; but sec. 12 (3) is the effective clause, and that makes "the lien" a charge on this fund, i.e., a lien must exist before there can be any charge, and here there is no lien.

3. It is unnecessary to give an opinion on the third question. As at present advised, however, I have no scintilla of doubt of the validity of the legislation of the Province, in view of the British North America Act, sec. 92 (14) and sec. 96.

The appeal should be allowed and the cross-appeal disallowed, both with costs.

LATCHFORD, J., agreed with RIDDELL, J.

KELLY, J.:—I agree with the opinion of my brother Riddell in answer to questions (a) and (b) referred to in the judgment appealed from, and I would on these grounds allow the defendants' appeal and dismiss the plaintiffs' cross-appeal.

This disposition of the matter renders it unnecessary, for the purposes of this action, to consider question (c); I therefore express no opinion upon it.

Appeal allowed; cross-appeal dismissed.

[APPELLATE DIVISION.]

1918

Dec. 27.

HUBBS v. BLACK.

Contract—Right of Burial in Cemetery Plot—Agreement between Brother and Sister—Oral Evidence to Establish—Statute of Frauds—Corroboration—Consideration—Part Performance—Nature and Effect of Agreement—Grant of Land—Possession—Limitations Act—Easement or License—Easement in Gross—Rules of Equity—Equitable Jurisdiction of County Courts—Implied License to Enter Plot to Care for Graves—Implied Agreement not to Revoke License—Death of Grantor—Claim by Devisee—Trespass—Removal of Corpse—Injunction—Release of Claims against Estate—Amendment—Counterclaim—Declaration of Rights.

The defendant's brother was the owner of a plot in a cemetery owned by a company organised under the Act respecting companies for the establishment of Cemeteries in Upper Canada, C.S.U.C. ch. 67. In 1904, the defendant intended to buy a plot for the burial of herself and her husband. Her brother told her that she need not buy a plot, that he would give her one, and it was agreed that she should not buy one, but that he would give her a plot and she would "put a tombstone there." She bought a tombstone, had cut thereon the names of herself and her husband, and took it to the cemetery. Her brother went with her and directed the placing of the tombstone on the eastern part of his plot, where it remained. The brother died in 1912, leaving a will whereby he devised all his estate real and personal to the plaintiff, his nephew, whom he appointed executor. The defendant made a claim against her brother's estate, which was settled by a money payment, and the defendant gave the plaintiff a release of "all claims and demands" against the estate. The defendant's husband died in 1917, and his body was laid in the eastern part of the plot. The plaintiff brought this action in a County Court, claiming damages for trespass, an order that the defendant remove the body of her husband, and an injunction against her trespassing upon the plot:—

Held, that the action was properly dismissed by the Judge of the County Court.

An agreement between the defendant and her brother was sufficiently proved and corroborated; and the release did not cover the plaintiff's claim under the agreement.

There was valuable consideration for the agreement—the defendant refraining from buying another plot.

Part performance—buying the tombstone and placing it upon the plot—removed any objection under the Statute of Frauds.

Per CLUTE, J.:—By the agreement there was a grant of the eastern portion of the plot to the defendant for the burial of herself and her husband, and she was entitled to an order vesting the same in her in fee simple.

The defendant had been in possession of the eastern part of the plot for more than 10 years before action, and under the Limitations Act her possessory title was valid, not only to the part upon which the tombstone stood, but to the part required for the burial of herself and husband.

If there was not a grant, but only an easement or license, there was an interest in land to which the easement could attach, and it was not an easement in gross.

Bryan v. Whistler (1828), 8 B. & C. 288, distinguished.

Per RIDDELL, J.:—The real agreement was that the defendant was to give up her project of buying another lot and to place a tombstone on the plot of her brother, and in return she was to have the right of burial for herself and her husband within her brother's plot. The right to bury in another's freehold is an easement; and formerly it could be conveyed only by deed; but now the rules of Equity prevail, and the County Courts have equitable jurisdiction. In Equity, an agreement for valuable consideration, not under seal, is sufficient to create a right to an easement. While the right of burial is still called an easement, it is an exception to the general rule that an easement cannot be in gross. Neither the brother in his lifetime nor the plaintiff, his devisee, could derogate from the right given by the brother.

App. Div.
1918
—
HUBBS
v.
BLACK.

Moreland v. Richardson (1856-7), 22 Beav. 596, 24 Beav. 33, and *Ashby v. Harris* (1868), L.R. 3 C.P. 523, followed.

A grant of the right to bury includes a license to do all that is proper and reasonable to keep the grave in a decent state of repair: *Ashby v. Harris*, at p. 530; there was an implied irrevocable license to the defendant to do such acts by the side of and over the grave as are decent and usual.

Per SUTHERLAND and KELLY, JJ.:—The agreement was for the right of burial of the defendant and her husband in her brother's plot. The contention that the agreement was in legal effect nothing more than a license, and, being merely oral, was revocable at any time in the lifetime of the testator and was revoked by his death, should not prevail: there was included in the agreement an implied term not to revoke the license.

Hurst v. Picture Theatres Limited, [1915] 1 K.B. 1, followed.

Quære, whether the plaintiff had not estopped himself by standing by in so far as the burial of the defendant's husband was concerned.

The plaintiff, in any event, had no higher right than his deviser, who could not have been heard to contest the defendant's rights under the agreement.

Ramsden v. Dyson (1866), L.R. 1 H.L. 129, followed.

Per CURIAM:—The defendant should have leave to set up a counterclaim and should have judgment thereon declaring her rights under the agreement.

AN appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Hastings dismissing an action, brought in the County Court of the County of Prince Edward, for trespass to a cemetery plot, and to compel the defendant to remove the body of her late husband from the plot, and to restrain the defendant from further trespassing on the plot.

The defendant claimed to be the owner of the eastern part of the plot and to have been in possession thereof for 15 years.

October 30. The appeal was heard by CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

E. G. Porter, K.C., for the appellant, argued that, even if there had been an agreement between William Babcock, the defendant's brother, and the defendant, whereby the defendant was granted the right to bury her husband in the plot in question, this agreement conferred on the defendant only an easement or a license, which, being merely verbal and not by deed, was revoked by Babcock's death: *Wood v. Leadbitter* (1846), 13 M. & W. 838; *Bryan v. Whistler* (1828), 8 B. & C. 288; Gale on Easements, 9th ed., p. 42.

H. H. Davis, for the defendant, respondent, contended that the defendant had been given the right to bury her husband in the plot; for that right she had given valuable consideration, and there was an implied term in the contract that the right would not be revoked. Since the Judicature Act equitable rules prevail, and the absence of a seal in the contract would not be enough to prevent the defendant from being a licensee with a grant, as it

would have been at the time of *Wood v. Leadbitter*: *Hurst v. Picture Theatres Limited*, [1915] 1 K.B. 1; Shirley's L.C., 9th ed., p. 127.

Porter, in reply.

App. Div.
1918
HUBBS
v.
BLACK.

December 27. CLUTE, J.:—Appeal from the judgment of the Senior Judge of the County Court of the County of Hastings, dated the 4th July, 1918.

This action is brought for trespass to a cemetery plot, and for an order directing the defendant to remove the body of her late husband, H. Black, from the said cemetery plot, and for an injunction restraining the defendant from further trespassing on the said lands.

The defendant claims to own the cemetery plot, part of plot No. 58, in question, and to have been in possession thereof for over 15 years. The facts are not in dispute.

Both the plaintiff and the defendant claim title through William Babcock, who was the brother of the defendant and the uncle of the plaintiff. William Babcock, in or prior to the year 1904, purchased the plot No. 58 in the cemetery for \$10. His sister, the defendant, being then also about to buy a plot in the said cemetery, was informed by her brother (William Babcock) that she need not do so; that he would give her the eastern part of the said plot for the purpose of the burial of herself and husband; and thereupon the defendant refrained from purchasing a plot, and purchased a monument, and, with the consent and in the presence of the said William Babcock, proceeded to erect the same on the said easterly part of the said cemetery plot No. 58. The said William Babcock assisted in the erection of the said monument, and the same has remained so erected upon the said plot ever since. At the time of its erection the names of the husband and wife were inscribed upon the monument and so remain. In this way the defendant has been in possession of the said easterly portion of the plot ever since.

The fact of the monument having been erected by the defendant in the manner aforesaid, and with the consent of the said William Babcock, raises a strong presumption of some agreement or arrangement existing between the owner of the plot and the defendant, sufficient to let in oral evidence of an agreement between

App. Div.
1918

HUBBS

v.

BLACK.

Clute, J.

the parties. The agreement is fully proven by the defendant and amply corroborated by the erection of the monument upon the plot.

On the effect of part performance, *Lester v. Foxcroft* (1700), Colles P.C. 108, and the note in *White & Tudor's L.C.* in Eq., 7th ed., vol. 2, p. 460, may be referred to, and *Shirley's L. C.*, 9th ed., p. 127, where it is said:—

“Courts of Equity have long been in the habit, when there were acts of part performance and the nature of the case seemed to require equitable interference, of decreeing specific performance of verbal agreements unenforceable at law, by reason of the 4th section of the Statute of Frauds, as being contracts concerning land. The general rule is, that, to justify such interference, the parties must, by reason of the act relied on, be in a position unequivocally different from that in which, according to their legal rights, they would have been if there were no contract. Thus, in the case of *Dickinson v. Barrow*, [1904] 2 Ch. 339, the defendant entered into a parol agreement with the plaintiff to buy a plot of land, together with a dwelling-house to be built by the plaintiff for her at an agreed price, according to a special plan approved by her. During the construction the defendant frequently visited the premises and requested certain alterations and additions, which were carried out. The Court held that the defendant's conduct in visiting the works and inducing the alterations was of such an unequivocal nature as to imply the existence of an agreement, parol evidence of which was therefore admissible, and that the alterations amounted to part performance so as to prevent the defence of the Statute of Frauds. In such cases the Court will try and ascertain what was the oral contract between the parties, and then will give effect to it: *Mundy v. Jolliffe* (1839), 5 My. & Cr. 167.”

Applying these cases to the present, and upon the facts, there can be no doubt that there was an agreement for valuable consideration, and that there was part performance sufficient to permit that agreement, though it was not in writing, to be shewn, and to admit parol evidence for that purpose, and so to entitle the defendant to the plot in question.

From the evidence it appears that there was a grant of the portion of the plot in question, as claimed by the defendant, for the

burial of herself and her husband, from William Babcock to her, for valuable consideration, and she is entitled to an order vesting the same in her in fee simple.

I am also of opinion that the defendant has been in possession of the plot for more than 10 years, and that under the Statute of Limitations her possessory title is valid. It is not denied by counsel that the possession and occupation by the defendant is complete so far as the portion of the land upon which the monument stands is concerned, but it is denied that this includes that portion of the plot required for the burial of the defendant and her husband.

In this contention I am unable to agree. The defendant was not a trespasser in what she did. The placing of the monument there had relation to the portion of the plot given to her by her brother for the purposes of burial of herself and husband, and the possession of the part occupied by the monument carried with it possession of the portion of the plot given to her by her brother.

It was urged by Mr. Porter that the defendant's claim, if any, was to an easement or license, and he referred to *Bryan v. Whistler*, 8 B. & C. 288, where a rector granted to A.B., by parol, leave to make a vault in the parish church, and to bury a certain corpse there, and that he should have the exclusive use of the vault; and afterwards, without the leave of A.B., opened the vault, and buried another person there; and it was held that no action could be maintained against him for so doing; for that if the rector had power to grant the exclusive use of the vault, he could not do it by parol. Bayley, J., after saying (p. 293), "If that were an interest in land, the grant could not be binding under the Statute of Frauds, unless there were a memorandum in writing signed by the party granting," goes on to say: "If it be not an interest in land it is an easement, or the grant of an incorporeal hereditament; which could only be effectually granted by deed, and no such instrument was executed. But even had a deed been executed, I think the defendant had not the power to grant any privilege, except for the particular burial then about to take place. The rector has the freehold of the church for public purposes, not for his own emolument; to supply places for burial from time to time, as the necessities of his parish require, and not to grant away vaults, which, as it seems to me, cannot be done unless a faculty has been obtained."

App. Div.
1918

HUBBS
v.
BLACK.
Clute, J.

App. Div.
1918
HUBBS
v.
BLACK.
Clute, J.

It thus appears that the case has no application to the present. The plot in this case was obtained for the express purpose of burial, and there was good consideration and a part performance in refraining from purchase by the defendant of a plot and by the erection of the monument. Some agreement was intended, and parol evidence was admissible to shew what that agreement was. There was an interest in the land to which the easement could attach. It was not an easement in gross. The *Bryan* case is referred to in *Ashby v. Harris* (1868), L.R. 3 C.P. 523, at p. 529; see also *McGough v. Lancaster Burial Board* (1888), 21 Q.B.D. 323, at p. 327. But, in my view of the facts, the agreement is not for an easement, but a grant of land for valuable consideration.

The appeal should be dismissed with costs.

RIDDELL, J.:—The defendant, who is now a widow, is the sister of the late William Babcock, who lived with her and her husband on their place for more than 7 years before his death in January, 1912. Babcock was the owner of a certain plot of land in a cemetery property organised under the Act respecting companies for the establishment of Cemeteries in Upper Canada, C.S.U.C. ch. 67; R.S.O. 1877, ch. 170. About 1904, the defendant intended to buy a plot for the burial of herself and her husband. Babcock said to her, "You need not buy a plot . . . I will give you a plot for you and your husband," and it was agreed that the defendant should not buy another plot, but that Babcock would give her a plot and she would "put a tombstone there." She bought a tombstone, had cut thereon the names of herself and her husband, and took it to the cemetery. Babcock went with her, and then himself directed the placing of the tombstone on the plot, where it still remains.

Babcock died in 1912, leaving a will whereby he devised all his estate real and personal to the plaintiff, his nephew.

The defendant brought an action against the plaintiff as representing the estate, claiming, amongst other things, payment for the care etc. of the deceased; this action was settled, and the defendant gave to the plaintiff a release of "all claims and demands" against the estate.

The defendant's husband died in December, 1917, and his body was laid in the plot.

The plaintiff brings an action in the County Court of the County of Hastings, claiming \$200 damages for trespass, an order that the defendant remove the body of her husband, and an injunction against her trespassing upon the lot—the learned County Court Judge dismissed the action, and the plaintiff now appeals.

While one part of the defendant's evidence would indicate that she thought that she was to have the ownership of a lot, a careful perusal of the whole of what she says shews that the real agreement was that she was to give up her project of buying another lot and to place a tombstone on the plot of her brother, and in return she was to have the right of burial for herself and her husband within her brother's plot.

Whether this action comes within the Evidence Act, R.S.O. 1914, ch. 76, sec. 12, we need not consider: there is overwhelming and uncontradicted corroboration of the contract on the part of the brother.

The right to bury in another's freehold is considered an easement which can be conveyed only by deed: *Bryan v. Whistler*, 8 B. & C. 288; *Moreland v. Richardson* (1856), 22 Beav. 596; *Ashby v. Harris*, L.R. 3 C.P. 523, 529; *North Manchester Overseers v. Winstanley*, [1908] 1 K.B. 835, 843; *S.C.*, *sub nom. Winstanley v. North Manchester Overseers*, [1910] A.C. 7.

Had the Administration of Justice Act or the Judicature Act never been passed, or were the County Court not a Court with equitable jurisdiction, the defendant might be in evil plight. But now the rules of Equity prevail, and the County Court has equitable jurisdiction.

Consequently an agreement for valuable consideration, though not under seal, is sufficient here to create a right to the easement claimed, and for the purpose of lawful user is as good as a deed: *Dalton v. Angus* (1881), 6 App. Cas. 740, at p. 782; *White v. Grand Hotel Eastbourne Limited*, [1913] 1 Ch. 113; *Walsh v. Lonsdale* (1882), 21 Ch. D. 9; *Rogers v. National Drug and Chemical Co.* (1911), 23 O.L.R. 234, 24 O.L.R. 486.

The part performance by the defendant by buying the tombstone, and placing it upon the plot, etc., removes any objection under the Statute of Frauds.

Refraining from buying another plot is in itself sufficient consideration. "A valuable consideration, in the sense of the law,

App. Div.
1918
—
HUBBS
v.
BLACK.
—
Riddell, J.

App. Div.
1918

HUBBS
v.

BLACK.

Riddell, J.

may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other:" *Currie v. Misa* (1875), L.R. 10 Ex. 153, at p. 162; and such forbearance may be found in anything which limits the legal freedom of action of that other in the future, even though the other receive no benefit or advantage. The tombstone bargain and purchase make the consideration perfect even if otherwise defective.

It is not necessary to discuss the well-known case of *Wood v. Leadbitter*, 13 M. & W. 838: that *crux* of the English law and stumbling block to those who wish to believe that the English law is the perfection of human reason, has been reduced to not much more than a matter of pleading by such cases as *Hurst v. Picture Theatres Limited*, [1915] 1 K.B. 1, 9, and *Lowe v. Adams*, [1901] 2 Ch. 598, 600.

What would appear at first sight a real difficulty in the way of the defendant is the principle that there can be no easement in gross, and that what purports to be such can be considered only as a personal contract sounding in damages: *Miller v. Tipling* (1918), 43 O.L.R. 88, 43 D.L.R. 469, and cases cited; *David Allen & Sons Billposting Limited v. King*, [1915] 2 I.R. 448, and cases cited.

And were this cemetery a common law burial ground, the God's acre of an English parish, there is some authority for saying that the rule would apply to a grant of the right to bury in it to one not otherwise entitled: Comyns, Dig., "Cemetery" (B); *Bryan v. Whistler*, *ut supra*.

But that rule, if it ever existed, was made to depend upon the peculiar legal position of the parish graveyard, and probably in any case applies only to an exclusive right to bury.

The rule in any event never applied to burial grounds not being parish graveyards, e.g., those attached to dissenting chapels: *Moreland v. Richardson* (1856), 22 Beav. 596; *S.C.* (1857), 24 Beav. 33; or those established by burial boards under (1852) 15 & 16 Vict. ch. 85 (Imp.): *Ashby v. Harris*, L.R. 3 C.P. 523.

In both these cases a personal grant was made of the right to bury, not at all to the grantee as being the owner of any land or messuage, but in gross; and it was held that the grantors had no power to derogate from that grant—in the former case an injunc-

App. Div.
1918
HUBBS
v.
BLACK.
Riddell, J.

tion was granted by Sir John Romilly, M.R.; in the latter a conviction was sustained by the full Court of Common Pleas against the Board for an assault upon the grantee when planting flowers on her husband's grave. Either would be inconsistent with the proposition that the grant simply sounded in damages.

Accordingly, while the right of burial is still called an easement, it is an exception to the general rule that an easement cannot be in gross.

Neither the deceased Babcock in his lifetime nor the plaintiff, his devisee, can derogate from the right given by Babcock—the plaintiff is in no higher position than Babcock would have been.

A release of all claims and demands against the estate is set up by the plaintiff—he himself says when asked about the release that the claims the defendant had against the estate were two only: (1) her legacy; and (2) for “keeping house for him and looking after him and the like of that;” that, when he made the settlement, these were the only claims in contemplation, and there was then no question about the burial lot. I do not think that the right the defendant had in the burial plot was a claim or demand against the estate: it was a property right in precisely the same way as though she and the deceased had been tenants in common, and not something she was claiming from the estate at all.

If the release should as it stands be given the construction contended for by the plaintiff, it would be a gross fraud to allow it to stand, and we should rectify it.

This disposes of the first claim of the plaintiff—there was no trespass to his lot.

The second claim, the ghoulish demand that the corpse of the defendant's husband should be dug up and carried off the plot, of course falls with the first—not that the cold clay of the dead man has any rights, but that the defendant has the right to keep the body there until the end of time. It is reasonably certain that the plaintiff's ashes, if and when they are laid in the same plot, will not receive any pollution or injury from those of his dead uncle.

The claim for an injunction was not much if at all pressed upon the argument: but it was not expressly abandoned and must be dealt with. It is hardly to be expected that the plaintiff will try to prevent the defendant from having access to the grave of her

App. Div.
1918
HUBBS
v.
BLACK.
Riddell, J.

dead: but the defendant is entitled to be protected against any attempt to do so. A grant of the right to bury must in our system include "a license to do all that was proper and reasonable to keep the grave in a decent state of repair:" *per* Willes, J., in *Ashby v. Harris*, L.R. 3 C.P. 523, at p. 530. In our civilisation, it is the custom to keep green the graves of our dead, to adorn them with flowers and plants, for the sorrowing survivor of the wedded mates to visit the grave of the spouse who has passed away. All these decent and usual acts by the side of and over the grave must have been in the contemplation of the party granting the right of burial; and there must be an implied irrevocable license to the defendant to do such acts. The plaintiff has no right to complain if the defendant upon his (the plaintiff's) land does nothing more than is seemly and customary by and about the grave of a deceased husband.

The dismissal of this action will probably be sufficient to prevent any improper interference by the plaintiff; but, if the defendant so desires, I think she should be allowed to set up a counterclaim for a declaration of her rights in the plot, and have a judgment so declaring. This would, if registered, prevent any purchaser from the plaintiff setting up the Registry Act; and it may well be that the Cemetery Act, R.S.O. 1914, ch. 261, sec. 12, does not afford the defendant protection.

The appeal should be dismissed: the defendant, if she so elects, may amend as indicated and recover judgment accordingly—the plaintiff should pay the costs here and below.

SUTHERLAND, J.:—In or prior to the year 1877, the Ameliasburg cemetery had been organised by one John G. Peck, and the burying ground consisted of a part of the east half of lot No. 93 in the 1st concession of the township of Ameliasburg, in the county of Prince Edward, divided in whole or part into lots or plots shewn on a map or plan thereof. In that year, one William Babcock purchased for the sum of \$10 lot No. 58 therein, and received the deed thereof. His sister, Sarah M. Black, the defendant, in or about the year 1903 or 1904, having mentioned to her brother that she and another sister were proposing also to buy a plot therein, he said to her, as she testified at the trial: "You need not buy a plot; I will give you and your man a burial in the plot;" or, as she puts it

elsewhere, "I will give you a plot for you and your husband," to which she replied: "If you give me a plot, I will put a tombstone there."

This agreement having been made between them, the defendant bought a monument, costing \$75, had the names of her husband and herself inscribed thereon, and had it conveyed to the cemetery. Her brother William himself procured and brought to the place a flat stone to form a pedestal to the monument, and it was placed thereon, in the said lot No. 58, at a point indicated by him, where it has remained ever since.

William Babcock died on or about the 20th January, 1911, having previously made his last will, dated the 10th January, 1911, wherein he devised and bequeathed all of his estate to his nephew, William J. Hubbs, the plaintiff herein, subject to the payment of some small legacies, and, among others, one to his sister, the defendant, of \$175, and he therein appointed the said nephew the executor of his will.

Litigation arose in connection with the estate, the defendant asserting certain claims for services alleged to have been rendered to the testator in his lifetime, and on the 11th January, 1912, she executed a release under seal in favour of the plaintiff as executor thereof, in consideration of the payment to her of the sum of \$375.

On the 5th December, 1917, Henry Black, the defendant's husband, died, and on the 7th December was buried in a grave dug where the said monument had been placed in the said lot No. 58. The plaintiff was present at the funeral and saw the interment of the body in the grave. He says he thought it was his duty to forbid it, but did not on account of the people and the circumstances. Shortly after, however, he informed the defendant that if she desired to leave her husband where he was, and to be buried there herself, she could have the right upon payment of \$200, and that, alternatively, she must remove her husband's body.

Upon her declining to pay the \$200, he commenced this action, claiming that amount for trespass and injury to the lot, asking for an order directing the defendant to remove the body of her husband, and an injunction restraining the defendant from further trespass.

The defendant pleaded a grant, leave and license from the deceased William Babcock in his lifetime, the placing of the monument in the lot with his approval and assistance, and possession ever since.

App. Div.
1918
HUBBS
v.
BLACK.
Sutherland, J.

App. Div.
1918

HUBBS

v.

BLACK.

Sutherland, J.

The defendant in reply pleaded the said release in bar, and at the trial obtained leave also to plead the Statute of Frauds.

It appears that, in addition to the legacy of \$175 referred to, part of the consideration in the said release was the sum of \$200 paid in settlement of the claims also referred to. When the release was executed, there had apparently been no mention of the cemetery lot or the defendant's claim with respect thereto. The defendant suggests that in this action the plaintiff is seeking to recoup himself for the \$200 mentioned.

The action was tried by the Judge of the County Court of the County of Hastings, and on the 4th July, 1918, judgment was pronounced dismissing the plaintiff's claim with costs.

The plaintiff admitted at the trial that, when the settlement covered by the release was made, nothing was discussed except the payment to the defendant of her legacy and her claim for taking care of her deceased brother, and that nothing was said about the lot at the time. The trial Judge found, and I think rightly, that the release was not intended to affect, and did not affect, the defendant's rights, if any, in the lot in question, and was not a bar thereto.

He further found that William Babcock, some years before his death, "gave to the defendant the right to bury her husband and to have herself buried beside him in this plot in question, and further, that at that time the defendant, with the consent of the deceased William Babcock and with his assistance, placed a monument at the spot where she was given the right to bury herself and her husband. The words used by the defendant in her evidence go even further than the right to bury. She says the deceased William Babcock said to her, 'I will give you a plot in my plot.'" And the learned Judge further found that "the defendant had full right to do just what she did do in burying her husband in this plot in the place marked out by this monument, and the spot where the monument was to be placed was named by the deceased William Babcock himself."

While some questions as to title were raised upon the argument, they were not pressed by the appellant; and indeed both parties to the action are expressly claiming the rights they assert under the assumption that William Babcock, deceased, was the owner of the lot in question.

The evidence clearly establishes the agreement entered into between the defendant and the deceased, to the effect that, if she refrained from buying another lot in the cemetery, as she had expressed to him her intention of doing, he would give her the right to bury her husband therein and to be herself buried therein, and, as part of the agreement, consented that she should erect, and permitted her to erect, in the lot, a monument which she proposed to buy; that, in pursuance of such agreement, she did buy the monument referred to, and did erect it at the place indicated by him in the lot, with his consent and assistance.

It is suggested on behalf of the plaintiff that, even if there were such an agreement, it was in legal effect nothing more than a license, and, being merely verbal and not by grant, was revocable at any time in the lifetime of the testator and was revoked by his death.

Reference was made upon the argument to the case of *Wood v. Leadbitter*, 13 M. & W. 838, in which it was decided that "a right to come and remain for a certain time on the land of another can be granted only by deed; and a parol license to do so, though money be paid for it, is revocable at any time, and without paying back the money." In that case "the evidence was, that Lord E. was steward of the Doncaster races; that tickets of admission to the grand stand were issued, with his sanction, and sold for a guinea each, entitling the holders to come into the stand, and the inclosure round it, during the races; that the plaintiff bought one of the tickets, and was in the inclosure during the races; that the defendant, by the order of Lord E., desired him to leave it, and, on his refusing to do so, the defendant, after a reasonable time had elapsed for his quitting it, put him out, using no unnecessary violence, but not returning the guinea." This is a case which, though much discussed and occasionally questioned, has been followed until recently.

In *Hurst v. Picture Theatres Limited*, [1915] 1 K.B. 1, it was held that "the purchaser of a ticket for a seat at a theatre or other similar entertainment has a right to stay and witness the whole of the performance, provided that he behaves properly and complies with the rules of the management. The license granted by the sale of the ticket includes a contract not to revoke the license arbitrarily during the performance. Where therefore the plaintiff,

App. Div.

1918

HUBBS

v.

BLACK.

Sutherland, J.

App. Div.
1918

HUBBS

v.

BLACK.

Sutherland, J.

who had purchased a ticket for a seat at a cinema show, was forcibly turned out of his seat by the direction of the manager, who was acting under a mistaken belief that the plaintiff had not paid for his seat:—Held . . . that in an action for assault and false imprisonment the plaintiff was entitled to recover substantial damages.”

At pp. 6 and 7, Buckley, L.J., says: “Let me for a moment discuss this present case upon the footing that *Wood v. Leadbitter*, 13 M. & W. at p. 844, stands as good law at this date. I am going to say presently that to my mind it does not, but suppose it does stand as good law at this date. What is the grant in this case? The plaintiff in the present action paid his money to enjoy the sight of a particular spectacle. He was anxious to go into a picture theatre to see a series of views or pictures during, I suppose, an hour or a couple of hours. That which was granted to him was the right to enjoy looking at a spectacle, to attend a performance from its beginning to its end. That which was called the license, the right to go upon the premises, was only something granted to him for the purpose of enabling him to have that which had been granted him, namely, the right to see. He could not see the performance unless he went into the building. His right to go into the building was something given to him in order to enable him to have the benefit of that which had been granted to him, namely, the right to hear the opera, or see the theatrical performance, or see the moving pictures as was the case here. So that there was a license coupled with a grant. If so, *Wood v. Leadbitter* does not stand in the way at all. A license coupled with a grant is not revocable; *Wood v. Leadbitter* affirmed as much. So far I have been treating it as if *Wood v. Leadbitter* were law as now administered in every Court.”

And, again, at pp. 9 and 10: “The position of matters now is that the Court is bound under the Judicature Act to give effect to equitable doctrines. The question we have to consider is whether, having regard to equitable considerations, *Wood v. Leadbitter*, 13 M. & W. 838, is now law, meaning that *Wood v. Leadbitter* is a decision which can be applied in its integrity in a Court which is bound to give effect to equitable considerations. In my opinion, it is not. Cozens-Hardy, J., as he then was, the present Master of the Rolls, in the case of *Lowe v. Adams*, [1901]

2 Ch. 598, at p. 600, said this: 'Whether *Wood v. Leadbitter* is still good law having regard to *Walsh v. Lonsdale*, 21 Ch. D. 9,'—which is a decision of the Court of Appeal—'is very doubtful.' The present Lord Parker, then Parker, J., in the case of *Jones v. Earl of Tankerville*, says this, [1909] 2 Ch. 440, at p. 443: 'An injunction restraining the revocation of the license, when it is revocable at law, may in a sense be called relief by way of specific performance, but it is not specific performance in the sense of compelling the vendor to do anything. It merely prevents him from breaking his contract, and protects a right in equity which but for the absence of a seal would be a right at law, and since the Judicature Act it may well be doubted whether the absence of a seal in such a case can be relied on in any Court.' What was relied on in *Wood v. Leadbitter*, and rightly relied on at that date, was that there was not an instrument under seal, and therefore there was not a grant, and therefore the licensee could not say that he was not a mere licensee, but a licensee with a grant. That is now swept away. It cannot be said as against the plaintiff that he is a licensee with no grant merely because there is not an instrument under seal which gives him a right at law.

"There is another way in which the matter may be put. If there be a license with an agreement not to revoke the license, that, if given for value, is an enforceable right. If the facts here are, as I think they are, that the license was a license to enter the building and see the spectacle from its commencement until its termination, then there was included in that contract a contract not to revoke the license until the play had run to its termination. It was then a breach of contract to revoke the obligation not to revoke the license, and for that the decision in *Kerrison v. Smith*, [1897] 2 Q.B. 445, is an authority."

Here, in the same way, William Babcock in his lifetime had entered into an agreement with the defendant in which she was to have the right of burial for herself and her husband in the lot in question. On the strength of that agreement she purchased and set up the monument in the lot. There was included in the agreement an implied term not to revoke the license, and it would be a breach of that contract to revoke the obligation not to revoke the license.

App. Div.
1918

HUBBS

v.

BLACK.

Sutherland, J.

Now under the County Courts Act, R.S.O. 1914, ch. 59, sec. 22 (1) (i), "actions for equitable relief where the subject-matter involved does not exceed in value or amount \$500," are within the jurisdiction of the County Court.

The erection of the monument where it was upon the lot in question was an act of part performance so unequivocally referable to some such contract as that put forward by the defendant as, if proved, would prevent the application of the Statute of Frauds. It is such an act of part performance as would let in proper parol evidence of the contract. The contract has been fully proved, and the objection as to the Statute of Frauds therefore fails.

It may be that the plaintiff has estopped himself by standing by in so far as the burial of the defendant's husband is concerned. He is in any event a mere volunteer. He can have no higher right than the testator. It would have amounted to a fraud on the part of the testator had he been alive and sought to set up the statute against the defendant. The plaintiff can be in no better position than he.

In *Ramsden v. Dyson* (1866), L.R. 1 H.L. 129, it was laid down that: "If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land." The present case is much stronger, as there was no error, and the testator was a definitely consenting party. He could not have been heard to contest the defendant's rights under the agreement; and the plaintiff, taking under him, cannot.

In order to avoid further difficulty, if the defendant desires, the pleadings may be amended and a declaration incorporated in the judgment defining her rights under the agreement which has been proved to exist.

The appeal should be dismissed with costs.

KELLY, J., agreed with SUTHERLAND, J.

Appeal dismissed.

[SUTHERLAND, J.]

1918

Dec. 28.

BURLINGTON PUBLIC SCHOOL BOARD v. TOWN OF BURLINGTON.

Municipal Corporations—Urban Municipality—Application of School Board to Council for Sum for Purchase of Site and Erection of School—Submission to Electors—Vote Negating Application—Renewal of Application—Refusal to Pass By-law—Resolution of Council Authorising Submission to Electors of Original Question and two Additional Questions—Duty of Council under sec. 43 of Public Schools Act, R.S.O. 1914, ch. 266—Municipal Act, R.S.O. 1914, ch. 192, sec. 398 (10)—Question Specifically Authorised—Injunction Restraining Submission of Additional Questions.

The school board of a town, under the authority of the Public Schools Act, R.S.O. 1914, ch. 266, sec. 43 (1), made an application to the town council to pass a by-law for borrowing \$30,000 for the purpose of purchasing a new site and erecting a new school-house. The council refused to pass such a by-law, but submitted the proposal to the vote of the qualified electors, under sec. 43 (3). Out of an electorate of 900, only 189 voted, and of these 110 were unfavourable to the proposal. The vote was taken in the summer of 1918. In November, 1918, the board again asked the council to pass a by-law for the same purpose or to submit the proposal to the electors at the municipal election in January, 1919. The council again refused to pass a by-law, but resolved to submit questions to the electors—not only the question which the board wished to have submitted, viz., “Are you in favour of school and site to cost \$30,000?” but also, “Are you in favour of school on old site to cost \$23,000?” and, “Are you opposed to new school?” An action having been brought by the school board to restrain the defendants from submitting the two additional questions, it was *held*, upon a motion for an interim injunction, that it was the duty of the council, on the application being renewed by the board, either to pass a by-law under sec. 43 (1) or to submit the question again to the vote of the electors, and to submit it *simpliciter*, without the additional questions, which might tend to confuse the minds of the electors and prevent a proper vote on the one question involved in the application of the board.

Held, also, that the real question which the council should submit to the electors was specifically authorised to be submitted to them, and sec. 398 (10) of the Municipal Act, R.S.O. 1914, ch. 192, did not apply.

Re Gaulin and City of Ottawa (1914), 6 O.W.N. 39, 16 D.L.R. 865, and *Gaulin v. City of Ottawa* (1914), 6 O.W.N. 38, followed.

An injunction was granted.

MOTION by the plaintiffs for an interim injunction restraining the defendants, the Municipal Corporation of the Town of Burlington, from submitting to the electors of the town entitled to vote on money by-laws, certain questions in relation to the providing of funds for school and site purposes for the Port Nelson district of the town.

December 26. The motion was heard by SUTHERLAND, J., in the Weekly Court, Toronto.

Sutherland, J.

1918

BURLINGTON
PUBLIC
SCHOOL
BOARD

v.

TOWN OF
BURLINGTON.

George Lynch-Staunton, K.C., and *W. L. Ross*, K.C., for the plaintiffs.

William Laidlaw, K.C., for the defendants.

December 28. SUTHERLAND, J.:—The defendants are an urban municipality, and the plaintiff corporation the School Board therein. The plaintiffs, under the authority of the Public Schools Act, R.S.O. 1914, ch. 266, sec. 43*(1), made an application on or about the 30th June, 1918, to the defendants to pass a by-law for borrowing money, namely, the sum of \$30,000, by the issue and sale of debentures for the purpose of a new site and school in place of the existing Port Nelson school in the defendant municipality.

The council refused to pass such a by-law, but took the necessary steps to submit and did submit the question to the vote of the qualified electors, pursuant to the provisions of sub-sec. 3 of sec. 43. The numbers of electors qualified to vote thereon was, as stated in the affidavit of the chairman of the plaintiff board filed, about 900, of whom 189 voted, and of these 110 against and 79 for the proposed appropriation. The chairman further says in his affidavit:—

"2. That during the last two years the plaintiff board have been endeavouring to secure from the defendants the necessary money for the purchase of a school-site and the erection thereon of a new school in the easterly section of the town of Burlington, necessary for the accommodation of the children within the said town of Burlington, but without any result. In the unanimous opinion of the said board, there is immediate additional school accommodation required for about 160 children. The providing of this

*43.—(1) The council of an urban municipality, on the application of the board, may pass a by-law for borrowing money by the issue and sale of debentures for any one or more of the following purposes:—

(a) The purchase . . . of a school-site; . . .

(c) The erection of a school-house

and it shall not be necessary that the by-law shall be submitted to the electors for their assent.

(3) Where the council refuses to pass such a by-law the question shall be submitted by the council, if requested by the board, to the vote of the electors qualified to vote under the Municipal Act on money by-laws and who are supporters of public schools, in the manner therein provided, and on the assent of such electors being obtained the council shall pass the by-law and issue such debentures; and it shall not be necessary that the by-law shall be submitted to the electors for their assent.

necessary school accommodation has become very acute of late, and this board do not see any practicable or reasonable way of doing so without the purchase of a school-site and erection thereon of a new 5-room school. The Department of Education during my whole term in office have been complaining of the want of accommodation, and are now threatening to compel the board to provide the necessary accommodation."

The smallness of the vote having been considered an unsatisfactory expression of opinion, the plaintiffs decided to make another application, and, on the 14th November, unanimously adopted a resolution in the following terms:—

"That an application be forthwith made to the Municipal Council of the Corporation of the Town of Burlington, under section 43, chapter 266, Public Schools Act, R.S.O. 1914, and amending Acts, for a by-law for borrowing \$30,000 by the issue and sale of debentures to pay for the erection of a school-house in the easterly section of the town of Burlington and for acquiring a suitable site for said school-house. And that council be requested that in event of their not passing by-law to have same submitted to ratepayers at municipal election in January, 1919."

On the 15th November the plaintiffs sent a certified copy to the defendants.

It is said that, between that date and the 6th December, considerable discussion occurred between the members of the board and of the council, in which it was urged on behalf of the board that, unless the council were willing to pass the by-law for the purpose already stated, they should submit the question again to the electors at the approaching municipal elections, when a large and satisfactory vote could be obtained. At a meeting of the council on said last named date, it refused to comply with the request of the board to pass the by-law, and the following extracts from its minutes and from letters which passed between the plaintiffs and defendants shew the action taken:—

"Moved by Councillors Page and Bunker that proper steps be taken to submit a by-law for \$30,000 for a new school in the east end as requested by the school board. Lost."

"Moved by Councillors Bodkin and Atkinson in amendment that a plebiscite be submitted to the people as follows: \$30,000

Sutherland, J.

1918

BURLINGTON
PUBLIC
SCHOOL
BOARD

v.
TOWN OF
BURLINGTON.

Sutherland, J.
1918

BURLINGTON
PUBLIC
SCHOOL
BOARD
v.
TOWN OF
BURLINGTON.

for a new school and new site; \$23,000 for a new school and old site. Carried."

On the 9th December, the plaintiffs wrote a letter to the defendants protesting that the council had no authority to add another and alternative question when submitting the matter of the board's application to the people, and that to do so would prejudice "securing a true vote on the question," and "might offer a matter of subsequent objection." The letter also intimated that, unless the defendants complied strictly with the plaintiffs' request, under sec. 43 of the Act, the board would take legal action for a mandamus to compel the defendants to do so.

The defendants, on the 10th December, replied and stated that the matter had been submitted a few months before to the electors exactly as the school board required it, and at a considerable cost, and further stated as follows in said letter:—

"In order that the wishes of the electors entitled to vote on such by-laws should be obtained for the guidance of the council only, with the least possible delay and expense, as you are aware, we passed a resolution at our last council-meeting directing an expression of the people to be taken on this subject by ballot of those entitled to vote on such money by-laws with the municipal elections, January next. The result of this vote will make clear to the council the wishes of the people, and, as I have said, I have no doubt the in-coming council will be guided by it."

To this communication the plaintiffs replied on the 12th December, stating as follows:—

"You are of course aware of, and we appreciate, the fact that it is now just too late to have the question on this board's requisition voted on at the coming municipal elections (when a large vote would have been assured). You had ample time for advertising, as our request was made a month ago," etc., and further suggesting "that the plebiscite proposed by" the "council be on the question only of \$30,000 for a new school and site."

The defendants did not accede to this request, and are proceeding, as appears by a poster or proclamation put in as part of the material on this application, to take "a vote" "by way of plebiscite to ascertain the wish of all electors entitled to vote on money by-laws," "in relation to the providing of funds for school and site

purposes for what is known as the Port Nelson school district. The ballot will be in the following form:—

Sutherland, J.

1918

BURLINGTON
PUBLIC
SCHOOL
BOARD
v.
TOWN OF
BURLINGTON.

Are you in favour of school and site to cost \$30,000?	
Are you in favour of school on old site to cost \$23,000?	
Are you opposed to new school?	

“Each elector entitled to vote is expected to mark a cross opposite the part of the ballot which expresses his wish.”

The plaintiffs thereupon, on the 24th December, commenced this action by the issue of a writ of summons, in which a claim is made “for an order restraining and enjoining the defendants from submitting to the electors,” etc., “certain questions in relation to the providing of funds for school and site purposes,” and “being the last two of the” questions referred to in the said poster.

This is a motion for an injunction and order restraining and enjoining the defendants from submitting the said two questions.

The grounds taken in the notice of motion are: (1) that it was the duty of the council to submit the question of passing a by-law for borrowing \$30,000 as required by the plaintiff board; (2) that the passing of by-law No. 372 of the defendant corporation on the 20th December, 1918, mentioned in the writ of summons, and the submitting of the three questions set forth therein, is not a compliance with the duty of the defendants under sec. 43; (3) that it is improper for the defendants to submit the last two questions to the electors, as they would thereby be misled and influenced to vote against the first of the said questions; (4) that the questions submitted are so drawn as to preclude any true expression of the views of the electors upon the questions asked by the plaintiffs to be submitted; (5) that the questions are not submitted to the vote of the electors in the manner provided by the Municipal Act.

It is of course undesirable that there should be friction between the school board and the council. As a rule it would not be expedient to have frequent requisitions made by a board for a

Sutherland, J.

1918

BURLINGTON
PUBLIC
SCHOOL
BOARD
v.
TOWN OF
BURLINGTON.

purpose on which the electors had been already consulted and on which they had expressed their opinion. It is apparent, however, that the vote already taken was not very satisfactory, having regard to the limited number of electors who saw fit to exercise their franchise. It is the duty of the board to supply adequate school accommodation. That is a matter in their judgment and discretion, and not in that of the council, subject, of course, to the right of the latter to have any question involved in an application made by the board to it submitted to a vote of the electors.

In the present case it seems to me the board might well have thought that the first vote was not satisfactory and that another expression of opinion was desirable. In order to avoid unnecessary expense, and to give the best opportunity to obtain a large vote, the suggestion to the council that the matter be again submitted at the coming municipal elections appears to have been an appropriate and reasonable one.

I am of the opinion that, in the circumstances, it was the duty of the council, on the application being renewed by the board in the manner indicated, to do one of two things, namely: (1) if the application commended itself, pass a by-law under sec. 43 (1) of the Act; or (2) if the council thought otherwise and refused to pass such a by-law, submit the question again to the vote of the electors. I further think that this should be done *simpliciter*, and that the members could not properly associate in the submission to the electors other questions such as questions 2 and 3 hereinbefore referred to, which, as it seems to me, might and most probably would tend to confuse the minds of the electors and prevent a proper vote on the one question involved in the application of the board.

Upon the argument, I was referred by counsel for the defendants to the Municipal Act, R.S.O. 1914, ch. 192, sec. 398, which deals with those questions with reference to which by-laws may be passed by the councils of municipalities, and para. 10 of which provides "for submitting to the vote of the electors of any municipal question not specifically authorised by law to be submitted." It seems to me, however, that the real question herein which the council should submit to the electors is specifically authorised to be submitted to them under sec. 43.

I was also referred to the case of *Davies v. City of Toronto* (1887),

15 O.R. 33, but am unable to see that it has any practical application to this case.

A helpful case, however, is *Re Gaulin and City of Ottawa* (1914), 6 O.W.N. 30, 16 D.L.R. 865, in which a by-law of the City of Ottawa was quashed, and in his judgment, Middleton, J., says: "The by-law in question is not within what is permitted by the Municipal Act, because it is an endeavour, by the substitution of a tricky and adroitly drawn question, practically to preclude any true expression of the views of electors upon the question proposed to be submitted."

The addition of questions 2 and 3 by the council seems to be likely to produce the same result. In the report of that case in 16 D.L.R. there is this further note: "It subsequently appearing that the defendant corporation intended, notwithstanding the quashing of the by-law, to go on and take the vote, apparently upon the theory that a vote may be taken by a municipality without a by-law so directing, an action was brought by Gaulin against the City of Ottawa for an injunction restraining the taking of the vote. A motion for an interim injunction was on March 7th, 1914, turned into a motion for judgment, and a permanent injunction granted." See *Gaulin v. City of Ottawa* (1914), 6 O.W.N. 38.

Upon the argument of the present case counsel for the plaintiffs said he would be content that this motion should also be turned into a motion for judgment, but counsel for the defendants declined to accede to this.

I have received, since the argument, a letter from counsel for the defendants intimating that he is authorised by the solicitor for the defendants to consent to a judgment being entered withdrawing the questions complained of and that the questions may be submitted for vote as follows: "(1) Are you in favour of the purchase of the property known as the Inglehart property on the north-west side of Water street, Burlington, for a site for the school in place of the present site? (2) Are you in favour of the erection of the new school on the present site?" and intimating that he was sending a copy of his letter to counsel for the plaintiffs.

The matter is somewhat urgent, in view of the nearness of the election. In the circumstances, I think it is my duty to grant an injunction and order restraining the defendants from submitting

Sutherland, J.

1918

BURLINGTON
PUBLIC
SCHOOL
BOARD

v.
TOWN OF
BURLINGTON.

Sutherland, J.

1918

BURLINGTON
PUBLIC
SCHOOL
BOARD

v.

TOWN OF
BURLINGTON.

to the electors of the town of Burlington, and that part of the township of Nelson included in the Burlington school section, questions 2 and 3 referred to in the notice of motion and in the proclamation or poster hereinbefore referred to, with costs to the plaintiffs of this application.

[MEREDITH, C.J.C.P.]

1918

Dec. 30.

BRAWLEY v. TORONTO R.W. Co.

Street Railway—Injury to Passenger—Fall Caused by Breaking of Strap—Negligence—Admission of Primâ Facie Case—Finding of Jury that Admitted Negligence was Cause of Injury—Evidence of Care in Selection—Contention that Primâ Facie Case Displaced—Absence of Evidence of Inspection—Cause of Breakage not Proved—Damages—Husband of Injured Passenger Joined as Co-plaintiff—Bills for Medical Attendance and Nurses Included in Sum Assessed by Jury—Dismissal of Action as against Husband—Costs.

A married woman was a passenger in a street-car; she was standing on the floor of the car, holding a strap, which was part of the equipment of the car; the strap broke, she was thrown to the floor and injured by the fall. At the trial of an action brought by her and her husband against the street railway company to recover damages arising from the injury, it was agreed by counsel on both sides that the breaking of the strap was sufficient evidence of negligence to support a judgment for the plaintiffs; and the jury found that the woman's injury was caused by the defendants' negligence; that that negligence was "caused by broken strap;" no contributory negligence; damages for the woman's injury, \$1,000; damages for the husband's actual loss, none:—

Held, that, the jury having found that the admitted *primâ facie* negligence was the cause of the injury, and having rejected the defendants' contention, presented to them by counsel, that the *primâ facie* case was displaced by evidence shewing that due care had been taken, and there being in fact no evidence upon which reasonable men could find that the case was displaced, there must be judgment for the plaintiff who was injured.

The evidence did not shew any kind of inspection of straps or any kind of oversight or special care of them; it went to shew that the breaking of a strap was practically a thing unknown before; and, after inspection of the broken strap, no witness was able to account for the breakage.

Held, also, that the action should be dismissed as against the husband, but without costs: adding him as a plaintiff was desirable in order that all claims arising out of the accident might be finally dealt with in one action only; the jury, in their award of damages to the wife, had made a reasonable allowance in respect of bills for medical and surgical attendance, nurses, etc., and these bills were at the trial treated as the bills of the wife.

ACTION by Kate Brawley and her husband, David Brawley, to recover damages arising from an injury to the plaintiff Kate Brawley when a passenger in one of the defendants' street-cars. She was standing on the floor of the car, holding a strap, which was part of the equipment of the car; the strap broke, she was thrown to the floor, and was injured by the fall.

The action was tried by MEREDITH, C.J.C.P., and a jury, at a Toronto sittings.

Meredith,
C.J.C.P.

1918

The jury answered questions left to them by the trial Judge as follows:—

BRAWLEY

v.

TORONTO
R.W. Co.

1. Was the female plaintiff's injury caused by the defendants' negligence? A. Yes.

2. If so, what was that negligence? State fully and clearly
A. Caused by broken strap.

3. Might that plaintiff, by the exercise of ordinary care, have avoided her injury? A. No.

4. What sum is reasonable compensation to her, under all the circumstances of the case, for her injury? A. \$1,000.

5. And reasonable compensation to the plaintiff her husband for his actual loss, if any? A. None.

F. B. Edmunds, for the plaintiffs.

D. L. McCarthy, K.C., for the defendants.

December 30. MEREDITH, C.J.C.P.:—The agreement of counsel, for the defendants and the plaintiffs, that the breaking of the strap was sufficient evidence of negligence to support a judgment for the plaintiffs in this action, makes the way of the female plaintiff, from verdict to judgment, plain sailing.

Starting upon that agreement, the verdict is plain, logical, and lawful. It means that the female plaintiff's injuries were caused by the negligence of the defendants, and that that negligence was that which the breaking of the strap proved.

But Mr. McCarthy's contention is that, though that is *primâ facie* so, yet the evidence of the merchant who sold to the defendants this particular strap, and thousands more perhaps, relieved the defendants from the effect of the *primâ facie* negligence and exonerated them.

Two difficulties, however, stand in the way of success upon any such ground: (1) the jury have found against it; they have found that the admitted *primâ facie* negligence was the cause of the injury, and they have rejected the defendants' contention, presented to them with much force by Mr. McCarthy, that that *primâ facie* case was displaced by the evidence for the defence shewing that due care had been taken; and (2) there was no evidence upon which reasonable men could so find.

Meredith,
C.J.C.P.

1918

BRAWLEY
v.
TORONTO
R.W. Co.

The evidence of the merchant, and the answers, to questions asked by me, of the witness the "conductor" of the car in which the accident happened, did not go to relief from a *primâ facie* case; it went rather to strengthen it if any such case really existed; it did not go to shew any kind of inspection of straps or any kind of oversight or especial care of them; it went to shew that there was no *primâ facie* case of negligence, that injury from the breaking of a strap was practically a thing unknown before, and so there was no need of inspection or any kind of especial care; and, after careful inspection of the broken strap, no witness was able to say more than that it was not possible for him to account for the breakage.

The female plaintiff is therefore entitled to the judgment which she seeks, with costs of the action; and as to the male plaintiff the action must be dismissed, but without costs, as the adding of this party was desirable so that all claims arising out of the accident might be finally dealt with in one action only; it was in the interests of the defendants as well as the plaintiffs; and the costs were in no substantial way increased by it.

Something was said regarding insufficiency of damages, and particularly of the male plaintiff's right to damages in the amount of the bills filed for medical and surgical attendances, nurses, etc., at least; but the bills were at the trial treated as the bills of the female plaintiff, and some of them bore evidence of having been doubled for the purposes of the action, that is, the charges were to be twice as much if recovered from the defendants as they would be if the woman paid them. There can be no doubt that the jury made to her that which they deemed a reasonable allowance in respect of all these bills in the amount of their verdict.

Indeed, starting with negligence admitted, no fault can be found, reasonably, with the verdict, by me; on the contrary, it seems to me to be reasonable in all respects; and as to the amount it must be said that it was impossible to hear the whole evidence without being persuaded that the female plaintiff made quite too much of and quite over-nursed her injury in so far as it was really attributable to the accident; not deceitfully or perhaps knowingly, just needlessly and nervously.

I have said more than once "starting from the point of the admitted *primâ facie* negligence," but, to make it plain beyond misunderstanding, must add: that the admission is one to which

the Court is in no sense a party; on the contrary, if called upon to express an opinion upon the subject, I should—off-hand at all events—dissent from the opinion of the two learned gentlemen who are in agreement with one another upon the subject: but I must give effect to their views; if I did not, and upon an appeal to a higher Court I should be held to be wrong and they right, the parties might well find fault with such an administration of justice, especially as this Court would not be liable for the costs of that appeal, and perhaps not very anxious to pay them.

Meredith,
C.J.C.P.

1918

BRAWLEY
v.
TORONTO
R.W. Co.

[MIDDLETON, J.,]

McCURDY V. OAK TIRE AND RUBBER CO. LIMITED.

1918

Dec. 30.

Company—Application for Shares—Misrepresentations by Agent of Company—“Statement” Shewn to Purchaser—“Prospectus”—Ontario Companies Act, R.S.O. 1914, ch. 178, secs. 99, 101 (3)—Absence of Allotment and Notice—Rescission of Application—Return of Money Paid.

The plaintiff signed an application for \$2,000 worth of shares in the defendant company, an industrial concern, organised under the Ontario Companies Act, R.S.O. 1914, ch. 178, and paid \$1,000 on account. He was shewn a document called a “statement,” issued by the company, which contained several untrue representations, bearing on the value of the shares, such as that all the earnings would be available for the common stock, and that the superintendent of the company’s factory had an interest in the company. Misrepresentations were also made to him by an agent of the company who obtained his application:—

Held, that the “statement,” as it was “issued for the purpose of being used to promote or aid in the subscription or purchase of” the shares of the company, was a “prospectus” within the meaning of sec. 99 of the Ontario Companies Act.

The misrepresentations were sufficient to justify a rescission of the agreement (if any) to take shares.

If the statement was not a prospectus, no prospectus was delivered at the time the subscription was obtained, and under sec. 101 (3) of the Act the plaintiff was not bound by and was entitled to withdraw his subscription; and, as no notice of allotment was ever sent to him, his withdrawal could be at any time.

There was not only no notice of allotment to the plaintiff, but there was no allotment. What was relied upon—a resolution of the directors—was too vague, and was not intended to apply to the plaintiff, who was never entered on the company’s register as a shareholder.

The plaintiff was declared not to be a shareholder, his application for shares was declared to be rescinded, and the defendant company was ordered to refund the \$1,000 paid by him.

THE plaintiff sued for a declaration that he was not a shareholder in the defendant company, upon the grounds that his application for stock was obtained by fraud and misrepresentation

1918
McCURDY
v.
OAK TIRE
AND
RUBBER CO.
LIMITED.

and that the application was withdrawn before acceptance and because the defendant company failed to comply with the requirements of the Ontario Companies Act as to its prospectus. He asked for a refund of \$1,000 paid on account of the \$2,000 stock applied for.

The defendant company counterclaimed for the balance which it said was due on the subscription.

The plaintiff also sued for \$1,140.72 for goods sold; judgment had been granted for this sum, but the issue of execution had been stayed pending the trial of the counterclaim.

December 3, 4, and 5. The action and counterclaim were tried by MIDDLETON, J., without a jury, at a Toronto sittings.

T. R. Ferguson, for the plaintiff.

C. W. Plaxton, for the defendant company.

December 30. MIDDLETON, J.:—A short review of the history of the company is necessary in order to appreciate fully the matters in controversy.

Mr. F. W. Law and Mr. J. H. L. Patterson carried on business in partnership under the name "Premier Tire Company." On the 3rd March, 1916, these gentlemen procured a charter under the Ontario Companies Act for the "Acme Tire and Rubber Company Limited," having a capital of \$400,000; \$500 of stock only was subscribed.

An agreement was at once made for the purchase of the partnership business for \$194,000, the purchaser assuming all the debts of the firm. This price was to be paid by \$10,000 debentures and \$184,000 stock, \$500 of which was to pay the original subscribers' stock and \$183,500 was to be issued as fully paid stock to the vendors. This stock was in due course allotted and issued.

To obtain funds to carry on the business, it was proposed to issue \$200,000 bonds, and a prospectus offering \$50,000 of these bonds was prepared and filed. This prospectus, it is said, was used for the sale of the stock to the plaintiff. I find against this contention, and that the document used was that filed as exhibit 3—to be discussed later.

The debenture scheme called for 30-year bonds guaranteed by the Imperial Trusts Company as to principal. All this in fact

meant, as shewn by the agreement of the 6th April, 1916, was that of each \$100 debenture the trust company set apart enough to produce \$100 by the accumulation of interest on the sum so set apart at the end of the 30 years; the surplus over the sum so set apart being all that was given to the company as working capital.

Under the agreement, the company undertook to give the trust company \$50,000 paid-up shares for distribution among those who might take bonds; the intention being that this should be contributed by the promoters. Only \$20,000 of these debentures were sold, and on this a commission of 25 per cent. was paid for procuring the subscriptions.

On the 22nd May, 1917, the company changed its name to "Oak Tire and Rubber Company Limited."

Stock had been sold or subscribed for, and, according to the returns, including the \$184,000 issued for the purchase-price, the total stock issued was a little over \$300,000 of the \$400,000.

This is an outline of the situation when Mr. Coulthard, an expert salesman of stock and bonds, entitled to a commission of 25 per cent. on all sales made, sought to induce the plaintiff to subscribe.

The "statement," as it is called, was the instrument used. It is a "prospectus" within the meaning of the statute (R.S.O. 1914, ch. 178, sec. 99), as it was "issued for the purpose of being used to promote or aid in the subscription or purchase of" the shares of the company (sub-sec. 1 (b)).

The document is remarkable in that it is silent as to the actual affairs of the company, and states only the result of the manufacture of an hypothetical number of tires at an assumed cost which would leave \$275,000 *per annum* "available for reserve and dividends on \$250,000 common stock." "This estimate is on the basis of 100 tires only per day, whereas, as shewn, the plant has a capacity of 400 tires per day."

While all this has no bearing on the precise misrepresentations complained of, it is of importance as indicating a general lack of fairness and honesty.

Notwithstanding the fact that only a little more than 300,000 shares had been issued in the way indicated, this "prospectus" bears on its face the statement: "Capital authorised \$400,000, all common shares. Full-paid and non-assessable." This again is not

Middleton, J.
1918
McCURDY
v.
OAK TIRE
AND
RUBBER CO.
LIMITED.

Middleton, J.

1918

McCURDY

v.

OAK TIRE

AND

RUBBER CO.
LIMITED.

complained of, as the statement to the plaintiff of the amount of stock issued was substantially accurate. What is complained of is, that it was made in such a way as to indicate that this amount of money had been put into the business—the payment of the bulk of the amount by the transfer of assets being concealed.

The issue of the debentures was also concealed, and McCurdy was told that there was no incumbrance. The circular as quoted indicated that all the earnings would be available for the common stock.

From the plaintiff's standpoint, the most serious misrepresentation was that the factory superintendent had taken \$5,000 stock. To the plaintiff this was an indication that this man, brought from similar works in the States, had such confidence in the business that he was ready to put his own money in it. The circular says, "He is interested in the company," but does not mention the amount.

These misrepresentations are made out and are sufficient to justify a rescission of the agreement (if any) to take stock.

This prospectus sins against every provision of Part VII. of the statute. No attempt is made to defend it as a prospectus—it is regarded as a mere "statement."

This not being a "prospectus" if the defendant company is right, no prospectus was delivered at the time the subscription was obtained, and under sec. 101 (3) the plaintiff was not bound by and was entitled to withdraw his subscription; and, as no notice of allotment was ever sent to him, his withdrawal could be at any time.

In the view taken, I need not discuss at length the other matters discussed. I do not think there was any allotment, and admittedly there was no notice of allotment; both are necessary.

What is relied upon as allotment was a note made at a directors' meeting in the October following the application in September. "It was moved . . . that all shares of stock subscribed for and transferred to date be hereby allotted and the allotment hereby confirmed." This, in my view, is not enough, as it is too vague. It was not intended to apply to the plaintiff, for his name was not sent to the registrar of stock (the Imperial Trusts Company), and no entry of the plaintiff as a stockholder was made, and he was not included as a stockholder in the return to the Government.

I conclude that the plaintiff is entitled to be declared not to be a shareholder of the company, and to have the application for shares rescinded, and to a refund of the \$1,000 paid, with interest from the 31st December, 1917; and to have his note cancelled; and to enforce his judgment for goods sold; and to have the counter-claim dismissed.

Middleton, J.
1918
McCURDY
v.
OAK TIRE
AND
RUBBER CO.
LIMITED.

[APPELLATE DIVISION.]

LYNCH-STAUTON V. SOMERVILLE.

1918
Dec. 1.

Solicitor—Bill of Costs—Action to Recover Amount of—Solicitors Act, R.S.O. 1914, ch. 159, sec. 34—Services Rendered by Plaintiff in Capacity of Solicitor—Reference for Taxation—Lump-sum Charged for Specific Items Set out in Bill—Compliance with Statute—Costs of Action and Appeal—Scale of Costs.

Upon an appeal by the plaintiff from the judgment of MASTEN, J., 43 O.L.R. 282, it was *held* (in this agreeing with MASTEN, J.), that the bill of costs sued on was such a bill as is covered by sec. 34 of the Solicitors Act, R.S.O. 1914, ch. 159; and, reversing the judgment, that the bill sufficiently complied with the Act.

Review of the authorities.

Gould v. Ferguson (1913), 29 O.L.R. 161, and *Re Solicitor* (1917), 12 O.W.N. 191, distinguished.

Re R. L. Johnston (1901), 3 O.L.R. 1, approved.

Blake v. Hummell (1884), 51 L.T.R. 430, applied.

Per RIDDELL, J.—The amount of remuneration which a lawyer should receive depends to some extent upon the magnitude of the interests concerned, and more upon the skill which he manifests on his client's behalf than upon the number of interviews he may have or the time spent. When negotiating for a settlement in a matter of importance, it is often impossible to attach a particular value to a particular interview and less or more to another; nor should either the client or the Taxing Officer require it. It is infinitely better to state in reasonable detail what the lawyer has done and what he has accomplished, and from the whole course of the transaction determine the fee to be allowed.

Held, also, that the plaintiff's costs of the action and of the appeal should be taxed on the scale of the Court in which the action was brought, i.e., the Supreme Court of Ontario, and paid by the defendants.

An appeal by the plaintiff from the judgment of MASTEN, J., 43 O.L.R. 282.

November 26. The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

Christopher C. Robinson, for the appellant, argued that the bill in question was drawn in compliance with the Solicitors Act, R.S.O. 1914, ch. 159, sec. 34. There had been a lump-sum charged for a series of negotiations, but that was not improper. There would

App. Div.
 1918
 LYNCH-
 STAUNTON
 v.
 SOMERVILLE.

be no difficulty in making a separate charge for each item. The object aimed at by the Act was to give the client an opportunity when he saw the bill to decide whether to pay it or have it taxed, and to enable the Taxing Officer to determine what he should tax off. The bill in question fulfilled these requirements.

H. S. White, for the defendants, respondents, contended that the bill was not drawn according to the Act, in that the amount charged for each service was not stated, but a lump-sum was charged for several services: *Gould v. Ferguson* (1913), 29 O.L.R. 161, 14 D.L.R. 17; *Philby v. Hazle* (1860), 8 C.B.N.S. 647, 7 Jur. N.S. 125. A bill which detailed the services rendered, and followed with a lump-charge, was not a compliance with the Act: *Re Solicitor* (1917), 12 O.W.N. 191.

Robinson, in reply, contended that the present case differed in its facts from the cases referred to by counsel for the respondents, and was not governed by them.

December 31. RIDDELL, J.:—This action was begun, by writ of summons specially endorsed, “for legal services rendered. The following are the particulars: Dec. 21, 1912, to Dec. 1, 1913, Fees, charges, and disbursements, \$1,089.90.” The affidavit filed with the appearance—which with the writ the plaintiff adopted as the pleadings—sets up that no proper bill had been rendered as required by the Solicitors Act, R.S.O. 1914, ch. 159, sec. 34*; and this is the sole issue.

The learned trial Judge, Mr. Justice Masten, decided that the contention of the defendants was well-founded, and dismissed the action with costs; the plaintiff now appeals.

At the trial it was admitted that the plaintiff was a barrister and solicitor and that he had been retained by the defendants;

*34.—(1) No action shall be brought for the recovery of fees, charges or disbursements for business done by a solicitor as such until one month after a bill thereof subscribed with the proper hand of such solicitor . . . has been delivered to the person to be charged therewith . . . or has been enclosed in or accompanied by a letter subscribed in like manner, referring to such bill.

(2) In proving a compliance with this Act it shall not be necessary in the first instance to prove the contents of the bill delivered . . . but it shall be sufficient to prove that a bill of fees, charges or disbursements subscribed as required by sub-section 1 . . . was so delivered . . . ; but the other party may shew that the bill so delivered . . . was not such a bill as constituted a compliance with this Act.

the receipt of the bill sued on was not denied—and the case is one of law, i.e., the proper interpretation of sec. 34 of R.S.O. 1914, ch. 159.

It appears that the defendant Somerville had certain property in Hamilton which he sold, and his purchaser sold to the Canada Grocers Limited. Somerville claimed that he had the right to repurchase within a certain time, and he wished to do so, taking in his co-defendant as an interested party in the repurchase. They saw the plaintiff, who wrote the owners, but they denied the alleged right of Somerville, as did the Dominion Cannery, who had an interest with the Canada Grocers. It was determined to issue a writ: the plaintiff told the defendants that he did not practise as a solicitor, and they retained as solicitor Mr. C., who issued a writ. Considerable negotiation took place, which resulted in a settlement, whereby Somerville was to have the property for \$30,000; this settlement was carried through; the plaintiff rendered a lump-sum bill, which the defendants refused to pay, whereupon the plaintiff rendered the bill in question; and, after the lapse of more than a year, it not being taxed, he sued—the defendants paid \$500 into Court; the plaintiff says: "I have always been willing to have it taxed. I am only insisting upon coming here because I want what I am entitled to by law . . . I . . . am here now to have it taxed."

The bill rendered contains 53 items of ordinary law services for which a fee might be charged; 39 of these have a fee charged; then there are two charges of a kind not quite usual, but in no way extraordinary: "Fee on revising deed, examination of title, closing transfer of property, etc., amount paid on settlement, \$30,000;" for which a charge of \$165 is made; and a "fee on negotiations as above set out and recovering property of the value of \$60,000, subject to a payment of \$30,000," charged at \$700: there are 14 items against which no charge is made—there are also 7 items which merely state the receipt of letters and the like, which of course have no charge. Of the 14 against which no fee is entered, there are 2 letters, 10 attendances and consultations, etc., 1 draft proposal, and 1 telephoning, all apparently being during the negotiations for settlement and being the "negotiations as above set out," referred to in the \$700 item. The plaintiff was offered a judgment for the \$500 paid into Court, but declined to accept it:

App. Div.
1918

LYNCH-
STAUNTON
v.
SOMERVILLE.
Riddell, J.

App. Div.
1918

LYNCH-
STAUNTON
v.

SOMERVILLE.

Riddell, J.

he also declined to accept judgment for such part of the bill as is admittedly according to the Act, as that would deprive him of the right to the remainder under the decision in *In re Davy* (1865), 1 U.C.L.J.N.S. 213, which we followed in *Gould v. Ferguson*, 29 O.L.R. 161, 14 D.L.R. 17.

I agree with the learned trial Judge that the bill sued on is such as is covered by sec. 34 of the Act; but I am unable to follow him in his decision that the bill as rendered is not a sufficient compliance with the Act.

It is argued that the present case comes within the decisions binding upon us: it will be well to consider the decisions.

The present bill has no resemblance to the bill in question in *Gould v. Ferguson*, 29 O.L.R. 161: that was almost wholly for conveyancing, attending registry offices, examining deeds, letters, searching executions, etc., etc., all of the most usual kind, and substantially every item the ordinary subject of a charge—nothing depended on ability in negotiation or the like, and the charge should in practically every case be the same whether the land was worth \$10,000 or \$100,000. In addition to the disbursements, a lump-sum of \$250 was charged for all the services rendered.

So, too, in *Philby v. Hazle*, 8 C.B.N.S. 647, 7 Jur. N.S. 125, a lump-sum bill was rendered at £50 and disbursements. The plaintiff set up that there was an agreement whereby he was to receive the sum of £50 and disbursements if he succeeded. He did succeed, and rendered a bill with items, every one of which admitted of a charge, but with a lump-sum covering them all. The sum of £50 was sued for as “for business done as per agreement” (8 C.B.N.S. at p. 647). The Court held the agreement not binding, and that the bill was not “in such a shape as will enable the Master to judge of the propriety of the several charges” (p. 653, *per Williams, J.*); the bill did not shew “the several items of charge” (p. 653, *per Willes, J.*); not “in such a form that the Taxing Officer of the Court may judge of their reasonableness” (p. 653, *per Byles, J.*)

In *Wilkinson v. Smart* (1875), 33 L.T.R. 573, the solicitor had been employed in five matters, apparently quite distinct—he rendered a bill setting out the work he had done in four of them, and did not place any charge against any of the four items—then as a fifth item he charged “Attending you” etc. (specifying the

business done, and continuing), "when ultimately Mr. C. told us that the matter had been arranged by Capt. F. having given an undertaking to pay you a lump-sum down, such sum to include £25, at which he agreed our costs should be taken, and attending you when you confirmed this statement and instructed me to take no further action in the matter—£25." Another item was: "Letters, messengers, cabs, etc.," but no sum was placed opposite thereto. This was held bad: Coleridge, C.J., says (p. 575): "There is nothing to enable the Master to exercise his discretion as to the propriety of the charges," etc., etc. Grove, J.: "If the items are not distinguished, how could the client make up his mind whether the charges were reasonable and such as he would pay without objection, or whether he would have the bill taxed? The Master would have to ascertain if he could how much of the amount ought to be disallowed; in fact he would have to find the value of each item by making some multiple (measure?) of £25." Archibald, J., says: "The object of . . . the Act . . . was to secure a mode by which the items of which the total sum was made up should be clearly and distinctly shewn, so as to give the client an opportunity of exercising his judgment as to whether the bill was reasonable or not, and to give the Master an opportunity of taxing it."

Nearly all the English cases lay down the rule, and are based upon the rule, that the bill must shew sufficient to enable both the client to exercise a reasonable judgment as to whether he will pay without taxation and the Master to ascertain how much, if any, is to be disallowed.

The next case shews how this rule works out:—

In *Blake v. Hummell* (1884), 51 L.T.R. 430, the bill, so far as material, read: "The Rev. F. H. Hummell to Edwd. F. Blake. 1881.—Oct. and Nov.—Perusing abstract of the title to Wilcot Lodge, Shanklin. Instructions for requisitions on the title and drawing same, and fair copy. Perusing Mr. Harper's replies thereto. Instructions for assignment. Drawing same, and fair copy for perusal. Engrossing same, and journey to London to examine the abstract, and completing purchase, including attendances, and correspondence with you and Mr. Harper and Messrs. Dean and Taylor, including travelling and hotel expenses . . . £38 10s. 1882.—April 1.—Yourself ats. Urry. Attendances on you in refer-

App. Div.
1918

LYNCH-
STAUNTON
v.
SOMERVILLE.
Riddell, J.

App. Div.
1918
—
LYNCH-
STAUNTON
v.
SOMERVILLE.
—
Riddell, J.

ence to this case on which you were summoned for an assault, and conferring thereon and receiving your instructions to attend the petty sessions on the hearing of the case, and attending accordingly on your behalf, when the magistrates considered an assault had been committed, and fined you in the penalty of 2s. 6d. and costs . . . £2 2s." The remaining items of the bill were properly described, and a distinct charge placed against each item, and as to them no objection was raised.

Denman, J., says (p. 431) as to the £2 2s. charge being "in reality a lump-sum for a number of services rendered," "It appears to me to be sufficiently specific, and it is a charge that can be fairly taxed by the Taxing Master." It will be seen that there were included in this charge: (1) an attendance on client when retained; (2) instructions to defend before the magistrates; (3) attendance before the magistrates at the trial.

It seems to me that the charge "Fee on revising deed, examination of title, closing transfer of property, etc. . . \$165," is just as specific and as fairly taxable as that passed upon favourably by Denman, J.

Mr. Justice Denman, in reference to the other items for what are in reality conveyancing charges, says: "The items . . . are numerous, and it is impossible to see from the bill what particular sums ought to be charged against each particular item." Dealing with a conveyancing bill in which it was possible to affix a charge to each item, he decided as we did in *Gould v. Ferguson*—but that is no authority for saying that no lump-sum charge is in accordance with the Act.

In *Gould v. Ferguson* we did not—and did not affect to—overrule *Re R. L. Johnston* (1901), 3 O.L.R. 1. There, there was a bill charging ordinary fees and disbursements in other proceedings, and also shewing in full the negotiations conducted by the solicitor resulting in a settlement and charging a lump-sum to cover all the services rendered by him in the negotiations out of Court—the Taxing Officer allowed \$3,200 for such services, and this allowance was approved by the Chancellor and the Divisional Court, leave to appeal to the Court of Appeal being refused. It is true that the objection was not expressly raised that the bill was insufficient: but the decision implied that the client had all he required, and the Taxing Officer could fairly tax it.

Taking the lump-sum of \$700 in the present bill, there is a detailed chronological account of what was done by the plaintiff in his negotiation leading up to settlement, so set out that the client could have no difficulty in exercising a judgment whether to pay the bill or to have it taxed: there was ample to enable the Taxing Officer to determine what (if anything) ought to be taxed off; and therefore, in my view, it is sufficient.

We are referred to a judgment, *Re Solicitor*, 12 O.W.N. 191, by Mr. Justice Middleton, in which that learned Judge thought himself bound by authority to hold that the bill did not conform to the statute—although he said, “with reference to the matter under discussion, common sense and case-law had long since parted company.” We have been furnished with a copy of the bill there under consideration, and find that it is for fees for attending on an arbitration, just such fees as would be charged by solicitor and counsel in an ordinary action before the change of the tariff in 1913, attendances at the registry office and on persons named, conferences with counsel, and the like, to every item of which a fee could with perfect facility be affixed—then a lump-fee of \$7,000 is charged.

In this bill I am unable to see the least difficulty in making a charge for each item: and there is nothing in the way of continued negotiations resulting in a settlement. The case is not at all like that now under consideration: I know of no case binding upon us at all like the present in which it has been held that a lump-sum charged for a series of negotiations or the like has been held improper. If case-law and common sense have parted company, it is the function of an appellate Court—and I humbly conceive its duty—to reconcile them, unless absolutely prohibited from doing so by binding decisions.

Common sense, I venture to think, indicates that the amount of remuneration a lawyer should receive depends to some extent on the magnitude of the interests concerned, and more upon the skill which he manifests in his client's behalf than upon the number of interviews he may have or the time spent. When negotiating for a settlement in a matter of importance, it is often impossible to attach a particular value to a particular interview and less or more to another: nor should either the client or the Taxing Officer require it. It is infinitely better to state in reasonable detail what the lawyer has done and what he has accomplished, and from the whole course of the transaction determine the fee to be allowed.

App. Div.
1918

LYNCH-
STAUNTON
v.
SOMERVILLE.
Riddell, J.

App. Div.
1918

LYNCH-
STAUNTON
v.

SOMERVILLE.

Riddell, J.

I entirely agree in what has been said in *Re Solicitor*, 12 O.W.N. at p. 192: "Where a professional man is called upon to advise upon a complicated situation and to take charge of investigations and negotiations, his fee can be better estimated by the result attained and the care and skill shewn in what was done than by any summation of items each attached to an individual move in the game played with living persons;" and, finding no case binding upon us which precludes me from so holding, I am of opinion that this bill answers the statute.

I would allow the appeal with costs here and below, direct the bill to be taxed by the proper officer, who will deal with the costs of taxation, and order that judgment be entered for the plaintiff for the amount found due by the Taxing Officer, with costs as above.

MULOCK, C.J. Ex., and CLUTE and SUTHERLAND, JJ., agreed with RIDDELL, J.

KELLY, J.:—At the close of the argument the only difficulty which appeared to me to stand in the way of the appellant was in respect of the charge of \$165 for "Fee on revising deed, examination of title, closing transfer of property, etc., amount paid on settlement \$30,000," as to which I was inclined to the opinion that we were bound by the decision in *Gould v. Ferguson*, 29 O.L.R. 161. That case was decided in appeal by the other members composing this Divisional Court; and, as they now unanimously state that the bill now under discussion has no resemblance to the bill in question in the *Gould* case, I see no reason why the appellant should not succeed.

I readily subscribe to what was said by Middleton, J., in *Re Solicitors* (1911), 2 O.W.N. 596, 18 O.W.R. 366, that many cases arise in which there are a series of consultations and interviews in the course of negotiation, and it is quite impossible to divide and allocate the sum proper to be paid between the different "items" of work done; and there are other cases where the work in its nature is an "entire" thing incapable of intelligent subdivision; and again: "When a solicitor is employed to adjust a matter of difficulty, nothing more injurious to the client could be suggested than that the solicitor's remuneration must depend upon the length of time taken

and the number of interviews had. One may grasp a situation with great rapidity, and his skill and experience may lead to its satisfactory solution in a way that after the event appears easy. Another, lacking the necessary skill and experience, may plod away at great length and in the end fail to reach as satisfactory a result, but an itemised bill would give him greater remuneration."

It can readily be conceived that in many instances the solicitor is sought out and retained because of his experience and his skill in attaining the desired result without unnecessary expenditure of time.

The appeal should be allowed, the bill referred to the proper officer for taxation, and judgment be entered for the plaintiff for the amount taxed, with costs of the appeal and of the action, including the costs of taxation if the Taxing Officer find the plaintiff entitled.

After the delivery of judgment as above, the defendants moved the Court to vary the minutes of the judgment as settled, in respect of the costs.

The direction at the end of the reasons for judgment of RIDDELL, J., was: "Allow the appeal with costs here and below, direct the bill to be taxed by the proper officer, who will deal with the costs of taxation, and order that judgment be entered for the plaintiff for the amount found due by the Taxing Officer, with costs as above."

White, for the defendants, pointed out that the bill might be reduced so that the amount recoverable upon it would be within or beneath the jurisdiction of a County Court, and asked that the costs should not be taxed and paid forthwith nor until the conclusion of the taxation.

Robinson, for the plaintiff.

THE COURT held that the trouble which arose in *Avery & Son v. Parks* (1917), 39 O.L.R. 74, ought not to be allowed to arise again; that the ordinary rule for the payment of costs such as these was that they should be taxed on the scale of the Court in which the action was brought, and paid forthwith; and that, therefore, the costs should be taxed on the Supreme Court scale and paid forthwith after taxation.

Order accordingly.

App. Div.
1918
—
LYNCH-
STAUNTON
v.
SOMERVILLE.
—
Kelly, J.

1918

[APPELLATE DIVISION.]

May 13.

Dec. 31.

WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS.

Municipal Corporations—Contract for Erection of Bridge—Sealed Agreement between Contractor and Township Corporation—Interpretation of—Fulfilment of Contract—Payment of Part of Price—Acceptance and User of Bridge—Findings of Fact of Trial Judge—Affirmance on Appeal—Absence of By-law Authorising Contract—Municipal Act, sec. 249 (1)—Necessary Work in Fulfilment of Obligation to Keep Highway in Repair (sec. 460 (1))—Executed Contract—Failure to Plead Want of By-law—Amendment not Asked for—Rule 183.

The plaintiff sued to recover a balance of the contract-price of a bridge which he built for the defendants, a township corporation. The bridge was to replace one which formed part of a highway in the township. The contract was in writing, and the seal of the township corporation was affixed thereto, but no by-law authorising the making of the contract was passed by the township council. The bridge was accepted by the defendants and was in use. The only defence on the record was that the bridge had not been completed according to the agreement; but at the trial, although no amendment was made or asked for, the defendants set up the absence of a by-law as a defence:—

Held, affirming the findings of fact of ROSE, J., the trial Judge, that, according to the true meaning of the contract, the plaintiff had done what he had contracted to do, and was entitled to recover the contract-price, unless the want of a by-law was a good defence to his claim.

And *held*, by MULOCH, C.J.Ex., CLUTE and KELLY, JJ., that, the contract being an executed one, and it being the duty of the defendants—in fulfilment of their statutory obligation (Municipal Act, sec. 460 (1)) to keep their highways in repair—to build the bridge, the absence of a by-law was not fatal, notwithstanding the provision of sec. 249 that the powers of the council shall be exercised by by-law.

Review of the authorities.

Waterous Engine Works Co. v. Town of Palmerston (1892), 21 Can. S.C.R. 556, and *Mackay v. City of Toronto* (1918), 43 O.L.R. 17, explained and distinguished.

Pim v. Municipal Council of Ontario (1860), 9 U.C.C.P. 302, applied.

Per RIDDELL and SUTHERLAND, JJ.:—The Court was not called upon to decide as to the necessity for a by-law—it was not pleaded, no amendment had been made, and none was asked for. Rule 183 does not compel the Court to amend *proprio motu*: amendments under that Rule are “to secure the advancement of justice,” not to enable a litigant to obtain a dishonest advantage. “The real matter in dispute” (Rule 183), the real issue, was, Did the plaintiff fulfil his contract?

Judgment of ROSE, J., who dismissed the action, considering himself bound by the decision in *Mackay v. City of Toronto*, reversed, and judgment directed to be entered for the plaintiff for the amount claimed.

ACTION to recover \$2,500, the balance of the price of a bridge erected by the plaintiff for the Municipal Corporation of the Township of East Williams, the defendants.

The action was tried by ROSE, J., without a jury, at a London sittings.

T. G. Meredith, K.C., for the plaintiff.

J. M. McEvoy and *C. St. Clair Leitch*, for the defendants.

1918

WITHER-
SPOON
v.

TOWNSHIP
OF EAST
WILLIAMS.

May 13. ROSE, J.:—The plaintiff's claim is for \$2,500, the balance of the price of a bridge erected by him for the defendants. There are no pleadings, the action having been commenced by a specially endorsed writ. The defence specifically raised by the affidavit of merits is, that the bridge has not been completed according to the agreement between the parties, in that the bridge for which the defendants agreed to pay was to be one of 15 tons' capacity, whereas the bridge erected is not of that capacity: at the trial, however, there was raised an additional defence, viz., that no by-law had been passed by the council of the defendant municipality authorising the order for, or accepting, the bridge. I delayed the delivery of judgment in order to see what the opinion of the Appellate Division might be upon the similar defence raised in the case of *Mackay v. City of Toronto*,* which, at the time of this trial, was standing for argument.

In January, 1915, the township council decided that a new bridge was necessary, and in some way or other it was made known that tenders would be considered. The recollection of the witnesses as to how this information was imparted is not quite clear; I think, however, that a plan (exhibit 2) and specifications (exhibit 3) were furnished to the probable tenderers, including the Sarnia Bridge Company, from whom the plaintiff procured the steel superstructure of the bridge. Both plan and specifications were prepared by Mr. Farncomb, a civil engineer, instructed by the Reeve in that behalf; neither shews the capacity of the bridge. After the invitations to tender had gone out, Mr. Farncomb wrote to the Reeve a letter dated the 8th February, 1915, in which he advised him to ask for figures on a "class A" bridge, instead of on a "class B" bridge, telling him that a "class A" bridge was designed to carry a concentrated live load of 15 tons at 10-foot centres, while a "class B" bridge would carry 10 tons at 10-foot centres. He also said "the latter" (i.e., class B) "bridge is not approved for main roads. It might be well to ask for alternative bids on each class of bridge, and then you could decide

*The judgment of MIDDLETON J. in the *Mackay* case is reported in 39 O.L.R. 34; it was affirmed by a Divisional Court of the Appellate Division on the 26th April 1918: see 43 O.L.R. 17.

Rose, J.

1918

WITHER-
SPOON
v.

TOWNSHIP
OF EAST
WILLIAMS.

which class to adopt." The definitions of the two classes are evidently taken from the specifications prepared under the direction of the Ontario Government for the assistance of municipalities: see the Annual Report upon Highway Improvement, 1911 (exhibit 18), p. 135.

No invitation to tender alternatively was sent out as suggested by Mr. Farncomb.

Tenders came in and they were opened at a meeting of the council held on the 22nd February, 1915. At that meeting Mr. Farncomb's letter was produced by the Reeve and was read. Amongst the tenders was one from the plaintiff for "your proposed bridge in accordance with plans and specifications furnished by your engineer," or rather, there is produced a letter from the plaintiff purporting to enclose such a tender. The letter is written in ink—but the prices are in pencil writing. The letter quotes prices for the steel superstructure \$4,145, and for the combined steel and concrete work \$6,400. There are also, in pencil, under the line quoting the price for the combined steel and concrete work, the words "for 15-ton capacity bridge \$200 more," and there are carried out into the margin the figures "\$6,600."

The evidence as to how the words written in pencil found their way into the letter, and as to what the real bargain was, is somewhat confused and conflicting, but I think that what really occurred was: that the plaintiff attended the meeting at which the tenders were considered, but was not in the room when Mr. Farncomb's letter was read; that the council decided that certain things not mentioned in the invitations to tender—an expansion apron, steel hub-guards, and the propping up of the old bridge until the new one was in place—would have to be provided for, and that they ought to have what they somewhat loosely called a "15-ton capacity" bridge; that the plaintiff was called in and was asked what he would charge for the apron, the hub-guards, and the propping up of the old bridge; that he said \$300, but finally agreed to take \$200; that there was some discussion as to the capacity of the plaintiff's proposed bridge, a strain-sheet (exhibit 4) furnished by the plaintiff being quite unintelligible to the council; that the plaintiff was told that the council desired a "15-ton capacity" bridge; that he asked what they meant by that, and was told that they meant a bridge that could be crossed by a 15-ton

threshing outfit; that the plaintiff said (as is true) that his bridge would be strong enough for that purpose; that the offer was accepted; and that the plaintiff inserted in his letter (exhibit 8) the words above quoted. The plaintiff says that the words were not all written at the one time; that the words and figures "\$200 more" and "\$6,600" were first written, as a part of the agreement to supply the extras; that, before he had finished the sentence, he was asked to retire from the room; that when he returned there was some talk about the capacity of the bridge, and that he then wrote "for a 15-ton capacity bridge," these words having no connection with the \$200, which has reference solely to the extras. I am not entirely satisfied that his recollection as to this being the way in which the words were added is accurate; but I am satisfied that the \$200 was for the extras, and that he was never asked to supply a "class A" bridge—that what the members of the council expressed themselves as wanting was a bridge that could safely be used by a 15-ton threshing outfit. They knew that the traffic in the road was not very heavy; some, at least, of them did not, even at the time of the trial, understand the difference between a bridge of "class A" and one of "class B;" what they thought was that it was desirable that the bridge should be safe for the occasional passage of a 15-ton threshing outfit, and they demanded an assurance from the plaintiff that his bridge would satisfy that requirement. If any of them really thought that they ought to have a bridge of "class A," as described by Mr. Farncomb, they could easily have expressed their thought by quoting his letter. They did not do so; and, if they have got, not what they wanted, but what they asked for, the fault is theirs, not the plaintiff's.

The agreement having been reached, a resolution was passed (exhibit 19) awarding the contract to the plaintiff. This calls for "a 15-ton capacity bridge," at the price of \$6,600, "according to plans and specifications of the engineer for said bridge."

After the meeting, the strain-sheet furnished by the plaintiff was by the Reeve submitted to Mr. Farncomb, without any suggestion that his advice as to calling for a "class A" bridge had been acted upon. Mr. Farncomb wrote, on the 13th March (exhibit 13), that the strain-sheet appeared to be quite satisfactory; and his approval was communicated to the plaintiff.

The council had insisted upon the concrete work being done by a

Rose, J.

1918

WITHER-
SPOON

v.

TOWNSHIP
OF EAST
WILLIAMS.

Rose, J.

1918

WITHER-
SPOON

v.

TOWNSHIP
OF EAST
WILLIAMS.

local contractor, and the plaintiff had it done accordingly. It has been paid for by the defendants. The plaintiff also ordered the steel from the Sarnia Bridge Company, and it was supplied.

Shortly before the council of 1915 went out of office, the Reeve and the plaintiff prepared a contract, upon a printed form furnished by the plaintiff (exhibit 1). This provides for a bridge to be completed on or before the 15th October, 1915, "in accordance with plans furnished by counsel" (*sic*) "for sixty-six hundred dollars and one hundred dollars for furnishing steel and widening west end of superstructure." (This widening, as also a certain lengthening of the centre span and a shortening of the approaches, had been agreed to by the plaintiff after the council meeting in February. The time for completion had been agreed upon originally, although the resolution and the letter contain nothing about it.) The Reeve took this contract (exhibit 1) to the last meeting of the council. It was explained that the incoming council ought to have before them something to shew what the bargain was, and the Reeve and the Councillor in whose riding the bridge was, signed it, and the clerk, apparently with the assent of the members, affixed the seal. It had been already signed by the plaintiff. No by-law or resolution authorising its execution was passed.

As has been mentioned, the original stipulation was that the bridge should be completed before the end of 1915; but there had been delay, for which, apparently, the plaintiff was not responsible. It was thought unwise to lay the concrete flooring during the winter; and a contract was executed, dated the 28th January, 1916 (exhibit 5), in which it was recited that the parties had agreed in writing that the plaintiff should build and the defendants should accept and pay for the bridge; that it was desirable to open the bridge for light traffic during the winter; that it had been agreed that the use of the bridge by the defendants should not be an acceptance, but that the duty of the plaintiff should be to finish and hand over the bridge by the 31st May, 1916, "completed according to the said agreement in writing," and that the duty of the defendants should be to accept and pay for it if so completed. The document went on to witness an agreement that the plaintiff should furnish temporary planking and the defendants should pay for it; that the plaintiff should have until the 31st May to complete the bridge; that upon its completion it should be

paid for as if it had been completed within the time fixed in the original agreement. This agreement bears the corporate seal of the municipality, but there was no by-law authorising its execution.

The plaintiff completed the bridge; there were disputes as to whether it was in accordance with the specifications. Mr. Farncomb inspected it and reported that certain work had to be done; this work was done, and the bridge is in good condition, and is in use by the defendants. It is well above the standard requirements of a "class B" bridge, and can safely be crossed by a 15-ton threshing outfit. The defendants have paid part of the price, but refuse to pay the balance, \$2,500.

If the want of a by-law is not an insuperable difficulty, I think the plaintiff is well entitled to succeed. Whether the contract is to be found in the letter of the 22nd February, 1915 (exhibit 8), and the resolution of the council of the same date (exhibit 19), as the defendants contend, or in the document executed at the last meeting of the council of 1915 (exhibit 1), as the plaintiff argues, or is to be gathered from the evidence, I think the plaintiff has performed his part. The words in the letter of the 22nd February, "a 15-ton capacity bridge," are susceptible of two meanings. They may mean a bridge designed to carry a concentrated live load of 15 tons at 10-foot centres, i.e., a "class A" bridge, or they may mean a bridge which can safely be crossed by a 15-ton threshing outfit. As I have said, I am convinced that it is in the latter sense that the parties used them, and the evidence is clear that the bridge answers the description. It is also built in accordance with the plans and specifications furnished by Mr. Farncomb, and with the strain-sheet approved by him. The plans and specifications prepared by Mr. Farncomb were put forward by the council; so that, whether the words of the contract be "plans and specifications furnished by your engineer," as in the plaintiff's letter, or "plans and specifications of the engineer for said bridge," as in the resolution, or "plans furnished by council," as in the formal document (exhibit 1), the plaintiff has done what he contracted to do.

I have, however, come to the conclusion that I cannot give judgment in favour of the plaintiff. The decision of the Appellate Division in *Mackay v. City of Toronto* is noted in (1918) 14 O.W.N.

Rose, J.

1918

WITHER-
SPOON
v.

TOWNSHIP
OF EAST
WILLIAMS.

Rose, J.

1918

WITHER-
SPOON
v.TOWNSHIP
OF EAST
WILLIAMS.

155, but is not yet fully reported.* The written opinions are, however, available, and I think that they compel me to hold that, even in the case of an executed contract such as this, the other contracting party cannot have judgment against the municipality unless the power of the council to enter into the contract has been exercised by by-law, in accordance with the statute, or there has been an adoption of the contract, evidenced by a by-law. There is, in this case, no difficulty about the seal. It was affixed to the contract executed in December, 1915 (exhibit 1), and, apparently, was so affixed with the assent of the members of the council present at the meeting; and it was affixed to the agreement of the 28th January, 1916, which recognises the existence of the contract; but, as I read the *Mackay* case, that is not enough; what is required is that the powers of the council shall be exercised by by-law; and there is no by-law here. The opinion of Mr. Justice Middleton at the trial was to that effect (39 O.L.R. 34, 46); Mr. Justice MacLaren, in whose opinion Mr. Justice Magee concurred, agreed with the trial Judge "as to the general result of the authorities" (14 O.W.N. at p. 156†); and Mr. Justice Ferguson was clear that sec. 249 of the Consolidated Municipal Act applies, whether the "power" which the council is exercising is an administrative power or a legislative power. He holds that the contrary opinion expressed by Gwynne, J., in his dissenting judgment in *Waterous Engine Works Co. v. Town of Palmerston* (1892), 21 Can. S.C.R. 556, does not state the law as established by the authorities.

If the power to contract is one that must be exercised by by-law, the use of the bridge by the defendants does not help the plaintiff. The argument based upon that use seems to be disposed of by Patterson, J., in the *Waterous* case, at p. 579; it is "the same discussion of section 282 (now 249) in a slightly different form." See also Middleton, J., in the *Mackay* case, 39 O.L.R. at p. 46.

The action will be dismissed, but without costs. I understood Mr. McEvoy to say, during the argument, that the members of the council were willing to pay what they thought the bridge was worth to the defendants. Perhaps it is not too much to hope that, notwithstanding the dismissal of the action, they may see their

*See now 43 O.L.R. 17.

†43 O.L.R. at p. 19.

way clear to do so, and that, in view of Mr. Farncomb's written opinion that "the bridge is well above the standard required for a class B bridge" (exhibit 16), and his evidence that the elastic limit of the bridge will not be exceeded by the passing of a 15-ton threshing outfit, they may conclude that the bridge is really worth to the defendants the whole or nearly the whole of the contract-price.

Rose, J.
1918
WITHER-
SPOON
v.
TOWNSHIP
OF EAST
WILLIAMS.

The plaintiff appealed from the judgment of ROSE, J.

November 25 and 26. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

T. G. Meredith, K.C., for the appellant, said that the learned trial Judge's findings were all in favour of the appellant: the contract had been signed and was under seal, and the appellant had completed his contract; but the trial Judge considered that the decision in *Mackay v. City of Toronto*, 43 O.L.R. 17, 43 D.L.R. 263, compelled him to hold that, as the council's power had not been exercised by by-law, in accordance with sec. 249 of the Municipal Act, R.S.O. 1914, ch. 192, the action must be dismissed. So the only question was, whether the appellant was debarred from recovery by the absence of a by-law. In the *Mackay* case, the strictest formality was required. The present case was entirely different. It was part of the duty of the municipality to keep the roads in repair, including the building and repair of bridges. The case also differed from *Waterous Engine Works Co. v. Town of Palmerston*, 21 Can. S.C.R. 556, as that case proceeded upon the ground that, though the contract was under seal, it was never executed, and the engine was not accepted. Counsel referred to *Pratt v. City of Stratford* (1887-8), 14 O.R. 260, 16 A.R. 5; *Campbell v. Community General Hospital Almshouse and Seminary of Learning of Sisters of Charity Ottawa* (1910), 20 O.L.R. 467; *Foster v. Reno* (1910), 22 O.L.R. 413; *Wright v. City of Ottawa and Ottawa Dairy Co. Limited* (1914), 7 O.W.N. 151, 19 D.L.R. 712. The contract here was executed. If all the powers of a council must be exercised by by-law, the work of a council could not be carried on. Reference also to *Croft v. Town Council of Peterborough* (1856), 5 U.C.C.P. 141; *McBain v. Township of Cavan* (1913), 5 O.W.N. 544; *Shawinigan Hydro-Electric Co. v.*

App. Div.
1918

WITHER-
SPOON

v.

TOWNSHIP
OF EAST
WILLIAMS.

Shawinigan Water and Power Co. (1911), 45 Can. S.C.R. 585;
Taylor v. Gage (1913), 30 O.L.R. 75.

J. M. McEvoy and C. St. Clair Leitch, for the defendants, respondents, argued that the learned trial Judge had been right in following the *Mackay* case, and said that they pressed the legal defence of the absence of a by-law. They referred to *Ponton v. City of Winnipeg* (1908), 41 Can. S.C.R. 18; *Young & Co. v. Corporation of Royal Leamington Spa* (1883), 8 App. Cas. 517; *Silsby v. Village of Dunnville* (1883), 8 A.R. 524; *Hunt v. Wimbledon Local Board* (1878), 4 C.P.D. 48. They also quarrelled with the Judge's finding that they had got the bridge they were entitled to. The municipality had got only a 10-ton bridge.

Meredith, in reply, argued there was ample evidence to support the Judge's finding of a 15-ton bridge, and that an appellate Court should not disturb that finding.

December 31. CLUTE, J.:—The facts as found by the trial Judge should not, in my opinion, be disturbed, and are quite sufficient to entitle the plaintiff to a verdict, if the want of a by-law is not an insuperable objection. Judgment was delayed by the trial Judge pending the decision of the Appellate Division in *Mackay v. City of Toronto*, 43 O.L.R. 17, 43 D.L.R. 263, and, when it was given, he felt compelled to hold "that, even in the case of an executed contract such as this, the other contracting party cannot have judgment against the municipality unless the power of the council to enter into the contract has been exercised by by-law, in accordance with the statute, or there has been an adoption of the contract, evidenced by a by-law."

The whole question therefore is, whether the plaintiff is entitled to succeed, upon the facts as found by the trial Judge, in the absence of a by-law.

The facts in the *Mackay* case differ widely from the case at bar. Maclaren, J.A., points out that the particular ground on which the judgment below was based was, that the defendants had never contracted with the plaintiff under seal or as required by the Municipal Act, and that the case did not fall within the class of cases in which such a formality might be dispensed with. In answer to the argument of counsel that, notwithstanding the lack of a seal, the plaintiff would nevertheless be entitled to recover

if the contract had been fully carried out, the learned Judge said that "in the present case it cannot be said that the council had any knowledge that any such contract had been made with the plaintiff as he now claims, and the testimony of the Mayor, of which the trial Judge expresses his 'full and unqualified acceptance,' shews that he had no idea that he was entering into any such contract in his dealings and communications with the plaintiff; and, even if he had, it had not been fully carried out, and could by no means be called an executed contract." Magee, J.A., concurred with Maclaren, J.A. Riddell, J., points out that "there was no executed contract in the sense that the council, knowing the facts, accepted the results of the plaintiff's labours. He had not even furnished what he set out to do—his 'final report' was never delivered. Any acceptance there was, was without a knowledge of the facts—and any so-called ratification was in the same condition." Hodgins, J.A., concurred with Riddell, J. The alleged contract was quite out of the ordinary, and one in which one would think the strictest formality would be required.

The present case is totally different; it is a part of the duty of the municipality to keep the roads in repair and fit for ordinary traffic, including the building and repair of bridges.

It is not disputed in the present case that it was the duty of the municipality to build the bridge in question. It is found that specifications and tenders were procured from an engineer authorised by the council to make them; that the plaintiff tendered in writing in accordance with the plans and specifications furnished by the defendants, and that his tender was accepted by resolution of council, and that the suggestion by the engineer that they should ask for tenders for "a bridge designed to carry a concentrated live load of 15 tons at 10-foot centres," was not received by the council until after the invitations for tenders had gone out; that, before the offer was accepted, there was some discussion as to the capacity of the bridge, and, when the plaintiff was told that the council desired "a 15-ton capacity bridge," he asked what they meant by that, and was informed that they meant a bridge that could be crossed by a 15-ton threshing outfit.

The trial Judge finds, on quite sufficient evidence, that the plaintiff never was asked to supply a "class A" bridge; that what

App. Div.
1918

WITHER-
SPOON
v.

TOWNSHIP
OF EAST
WILLIAMS.

Clute, J.

App. Div.
1918

WITHER-
SPOON

v.

TOWNSHIP
OF EAST
WILLIAMS.

Clute, J.

the members of the council expressed themselves as wanting was a bridge that could safely be used by a 15-ton threshing outfit. They got in fact what they asked for. The strain-sheet furnished by the plaintiff was by the Reeve submitted to the defendants' engineer without any suggestion that the advice as to calling for a "class A" bridge had not been acted upon. The engineer advised that the strain-sheet appeared to be quite satisfactory, and his approval was communicated to the plaintiff.

The council insisted on the concrete work being done by a local contractor, and the plaintiff had it done accordingly, and it was paid for by the defendants.

The contract provided that the bridge should be finished by the 15th October, 1915, "in accordance with the plans furnished by the council, for \$6,600 and \$100 for furnishing steel and widening west end of superstructure." There had been some delay, for which the plaintiff was not responsible; it was thought unwise to lay the concrete flooring during the winter; and a further contract was executed by the parties, dated the 28th January, 1916, in which it was recited that the parties had agreed in writing that the plaintiff should build and the defendants should accept and pay for the bridge; that it was desirable to open the bridge for light traffic during the winter, but it had been agreed that the use of the bridge by the defendants should not be an acceptance, but that the duty of the plaintiff should be to furnish and hand over the bridge by the 31st May, 1916, "completed according to the said agreement in writing," and that the duty of the defendants should be to accept and pay for it when so completed; that the plaintiff should furnish temporary planking, and that the defendants should pay for it; that the plaintiff should have until the 31st May to complete the bridge; that, upon its completion, it should be paid for as if it had been completed within the time fixed in the original agreement.

This agreement bears the corporate seal of the municipality, but there was no by-law authorising its execution.

The trial Judge finds that "the plaintiff completed the bridge; there were disputes as to whether it was in accordance with the specifications: Mr. Farncomb," the defendants' engineer, "inspected it and reported that certain work had to be done; this work was done, and the bridge is in good condition, and is in use by the

defendants. It is well above the standard requirements of a 'class B' bridge, and can safely be crossed by a 15-ton threshing outfit. The defendants have paid part of the price, but refuse to pay the balance, \$2,500. If the want of a by-law is not an insuperable difficulty, I think the plaintiff is well entitled to succeed."

Having regard to the findings upon which the judgment was based in each case, I am of opinion that the *Mackay* case differs so materially from the present that it is not an authority decisive of the case at bar.

Waterous Engine Works Co. v. Town of Palmerston, 21 Can. S.C.R. 556, is the leading authority for the necessity of a by-law. That case proceeded upon the ground that, though the contract was under seal, it was never executed, and that the engine was not accepted. Strong, J., said: "Mr. Justice Rose, before whom the cause was tried, the Divisional Court of Chancery, and the Court of Appeal, have all successively held that the contract was never executed but was wholly executory. In this conclusion I entirely agree. The much debated question as to the liability of a corporation on an executed contract not entered into with the requisite formalities imposed *either by common law or by statute does not, therefore, arise here*. The question we have to determine is whether the municipal corporation of an incorporated town is liable on a contract for the purchase of a fire engine which has been entered into without the authority of a by-law under seal, and which contract has remained unexecuted."

The decision of a majority of the Court is limited to a case where the contract was not executed, and the fair inference is that, had it been satisfactorily established before the trial Judge that the contract was not executory but executed, the decision of the Supreme Court of Canada would have been the other way. Gwynne, J., as I read his judgment, treated the contract as executed, and it was thus a difference in respect of the question of fact that gave rise to the differences of opinion in that Court, and created a difference of opinion as to when a by-law is necessary.

Accepting the view that the contract in that case was executed and the engine accepted by the corporation, the reasons of Gwynne, J., seem to me to be unanswerable; and, having regard to the difference in the findings of fact, the case is, I think, an authority for the plaintiff in this action.

App. Div.
1918

WITHER-
SPOON
v.

TOWNSHIP
OF EAST
WILLIAMS.

Clute, J.

App. Div.
1918

WITHER-
SPOON
v.
TOWNSHIP
OF EAST
WILLIAMS.

Clute, J.

Reference is made, in the case referred to, to *Pim v. Municipal Council of Ontario* (1860), 9 U.C.C.P. 302, at p. 304, and Gwynne, J., points out that in *Perry v. Corporation of Ottawa* (1864), 23 U.C.R. 391, Draper, C.J., held that the Court, notwithstanding the passing of the Municipal Act of 1858, which contained the clause now under consideration, was bound by the judgment in the *Pim* case. In that case the Chancellor points out (9 U.C.C.P. at pp. 305, 306) that "the action is brought upon an executed contract. The court-house had been built under the supervision and to the satisfaction of the defendants' architect before action brought. The justice, therefore, of compelling the defendants to pay for the work, labour, and materials, of which they have had the benefit, is obvious; and if there be a principle upon which they are to be absolved from that just liability, it must be the principle, that being a corporation, their will cannot be expressed except through their common seal; and as they are incapacitated from making their own will known, except through their common seal, so it cannot be implied by courts of justice. . . . Now it will be found, I apprehend, that there never was any such universal rule as that which has been supposed."

The Chancellor (p. 306) quotes, among other cases, the observations of Erle, J., in *Henderson v. Australian Steam Navigation Co.* (1855), 25 L.T. (O.S.) 234, at p. 235: "It would be very dangerous to rest the exception upon the ground of frequency or insignificance; nor do I gather from the cases that that has been put forward as the principle. Certainly, as to trading corporations the exception has not been so limited; and I think that the soundest principle on such a matter is to look to the nature and subject-matter of the contract, and if that is found to be within the fair scope of the purposes of incorporation, to hold the contract binding, even though not under seal."

Hagarty, J., in the *Pim* case (9 U.C.C.P. at p. 312) quotes from Lord Denman in *Hall v. Mayor etc. of Swansea* (1844), 5 Q.B. 526, 547, where he says: "If the corporation have helped themselves to another's money, it would be absurd to say that they must bind themselves under seal to return it." And at p. 313, Hagarty, J., says: "I cannot see that it is the law of the land to consider the distinction between executed and executory contracts as exploded. Nor can I regard the cases in which

corporations may be held liable without seal as confined to those of small amount and daily occurrence. . . . I do not consider a decision of this case in the plaintiff's favour in any way countenancing a right to sue a corporation for damages on an executory contract not under seal, which they have repudiated before the work was done or accepted by them. I am quite willing to maintain the rigor of the law on that point. The distinction appears broad and intelligible between such cases and the present. The evidence in this case removes all difficulty on the question of acceptance by the defendants of the plaintiff's work; they were incorporated expressly to build this court-house and gaol; they engaged the plaintiff to build it, and they take it from him and for two years use it as such, and in it they transact all their official business as their official habitation."

These remarks apply, in my opinion, with full force to the present case, with this difference in the plaintiff's favour, that in the present case the contract is under seal, and again affirmed under seal by a further contract extending the time for completion.

Section 460 (1) of the Municipal Act provides that "every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it . . . and in case of default, the corporation shall be liable for . . . damages."

Section 8 of the Municipal Act provides that "the inhabitants of every . . . township shall be a body corporate for the purposes of this Act."

Section 249 (1) provides that, "except where otherwise provided, the jurisdiction of every council shall be confined to the municipality which it represents and its powers shall be exercised by by-law."

As a general rule, no doubt, contracts entered into by a corporation must be made under seal, otherwise they cannot be enforced: *Mayor etc. of Kidderminster v. Hardwick* (1873), L.R. 9 Ex. 13.

It is said the seal of the corporation when affixed is equivalent to the signature by a private person and places the corporation in a similar position: *Dartford Union Guardians v. Trickett and Sons* (1888), 59 L.T.R. 754.

The corporation is not bound to set up the absence of a corporate seal: *Bournemouth Commissioners v. Watts* (1884), 14 Q.B.D. 87; and may ratify the contract under its seal: *Brooks Jenkins & Co.*

App. Div.
1918

WITHER-
SPOON
v.

TOWNSHIP
OF EAST
WILLIAMS.

Clute, J.

App. Div.
1918

WITHER-
SPOON
v.

TOWNSHIP
OF EAST
WILLIAMS.

Clute, J.

v. *Torquay Corporation*, [1902] 1 K.B. 601; *Melliss v. Shirley Local Board* (1885), 14 Q.B.D. 911, reversed on other grounds, 16 Q.B.D. 446 (C.A.)

Even where a contract is not formally ratified, a corporation may be bound by acquiescence: *Hoare and Co. Limited v. Lewisham Corporation* (1902), 18 Times L.R. 816 (C.A.)

If sec. 249 of the Municipal Act is to be construed as meaning that all powers of the council shall be exercised by by-laws, it would paralyse the action of corporations in their multitudinous duties.

I think the sound view to be applied in a case like this is, that regard should be had to the nature and subject-matter of the contract, and, where the work to be performed by the contract falls within the scope and duty of the corporation, and the contract has been executed, and the corporation has accepted the work, it is liable for payment; and this would be so even if the contract were not under seal.

The appeal should be allowed and judgment entered for the plaintiff for \$2,500, with interest and costs here and below.

MULOCK, C.J.Ex., agreed with CLUTE, J.

RIDDELL, J.:—This is an action begun by writ of summons specially endorsed “to recover from the defendants the sum of \$2,500 and interest thereon from the 1st day of June, 1916. The following are the particulars: Balance due under a contract made between the plaintiff and the defendants for the construction and erection by the plaintiff for the defendants of a steel superstructure bridge, concrete substructure and floor, as provided and agreed upon by agreement in writing between the parties. . . \$2,500.” (A claim for interest is added.)

The affidavit of the present Reeve, filed with the appearance, sets up that, from information received from members of the council “who were in office when the agreement concerning the building of the bridge, part of the price of which bridge is being sued for in this action, was made, I verily believe that the said bridge has not been completed according to the agreement between the municipal corporation and David Witherspoon. . . . The bridge which the municipality agreed to pay for was to be a bridge

with a 15-ton capacity, and . . . the bridge which has been constructed by David Witherspoon is not a bridge of 15-ton capacity, nor does it . . . approach nearly to that strength."

This affidavit, by Rule 56 (1), sets out "the facts and circumstances which" the defendants deem "entitle" them "to defend the action:" and the plaintiff elected to treat his special endorsement and this affidavit as the record; no pleadings were delivered, and the action went down for trial on this record.

The issues were and are quite plain: the plaintiff alleges that he had a written agreement with the defendants to build a certain bridge for them; the defendants do not dispute the agreement, but themselves assert it—and allege that the plaintiff has not carried it out, as he was bound to build a "bridge of 15-ton capacity."

The council of the township, desiring to make a better crossing over the Aux Sables River, advertised for tenders; the plaintiff put in a tender, whereupon the council had the following proceedings:—

February 22, 1915: "Tenders opened for construction of McKenzie bridge over Sauble River, on motion of Loomis and Fraser that we award D. Witherspoon the contract of a fifteen-ton capacity bridge, steel superstructure and concrete abutments, of what is known as the McKenzie bridge of East Williams, sixty-six hundred dollars (\$6,600), according to plans and specification of the engineer for said bridge. Carried."

The plaintiff ordered his material in March, and got it on the ground by the middle of the summer, having then blue print and specifications with strain-sheet, but no formal contract. The existing council being due to go out of office in January, a formal contract was entered into and executed by the plaintiff, and the Reeve and one Councillor of the municipality, with the seal of the municipality affixed—this the Councillor informs us was executed "to shew the other council coming in what Witherspoon is to get." This, leaving out what is quite immaterial, reads:—

"This contract, made in duplicate, this tenth day of A.D.19 , between David Witherspoon, of the Town of Ailsa Craig, in the County of Middlesex, and Province of Ontario, hereinafter called 'the contractor,' of the first part, and East

App. Div.
1918

WITHER-
SPOON
v.

TOWNSHIP
OF EAST
WILLIAMS.

Riddell, J.

App. Div.
1918

WITHER-
SPOON
v.
TOWNSHIP
OF EAST
WILLIAMS.

Riddell, J.

Williams Township Council, hereinafter called 'the corporation,' of the second part:—

"Witnesseth, that, for and in consideration of the payments hereinafter specified to be well and truly made by the said corporation to the said contractor:—

"The said contractor hereby covenants and agrees to furnish all the fabricated steel and concrete materials and do all the necessary labour in the construction and erection of a 127-in. steel superstructure, concrete substructure, and floor for the said corporation in accordance with the plans furnished by counsel (*sic*) which are incorporated herewith and made a part of this agreement.

"The said work shall be completed on or before the 1st day of October, 1915, it being understood that the substructure shall be made ready by the said corporation to receive the superstructure, on or before the day of , 19 .

"The said corporation hereby covenants and agrees to pay the said contractor, his executors, administrators, or assigns, for said work, the sum of sixty-six hundred dollars and one hundred dollars for furnishing steel and widening west end of superstructure, to be paid in Ailsa Craig, as follows: upon delivery of materials at the bridge-site 75% of the contract-price and the balance 30 days after completion when said work is erected and ready for traffic."

Delays took place, and the incoming council had an interview with the plaintiff, which resulted in the solicitor for the municipality drawing up another agreement and having it signed by the plaintiff and all the members of the council—also by the clerk—and the seal of the township corporation was affixed. This reads:—

"Memorandum of agreement made this 28th day of January, 1916, between the Municipal Corporation of the Township of East Williams, hereinafter called 'the township,' and David Witherspoon, of the village of Ailsa Craig, in the county of Middlesex, contractor, hereinafter called 'the contractor.'

"Whereas the parties hereto have agreed in writing that the contractor should build and the township should accept and pay for according to the said agreement in writing a certain bridge over the Aux Sable River where the said river crosses the allow-

ance for road in the said township between lots numbers ten and eleven in the sixth concession of the said township.

"And whereas there has been delay in completing the said bridge, and on account of weather conditions it is not possible or proper to finish the said bridge by the laying of the concrete floor thereon during winter weather.

"And whereas it is desirable to open the said bridge for light traffic during the winter.

"And whereas it has been agreed between the parties that the contractor furnish planking for the floor of the said bridge and put the same in place and that the township pay the cost of the planking when the said bridge is finished, and then own the said planking.

"And whereas it has been agreed between the parties that the contractor shall have until the 31st of May to finish the said bridge, and that the fact that the township shall have use of the said bridge for light traffic during the winter shall not in any way prejudice the township or be construed as an acceptance of the said bridge by the township, but that the duty of the contractor shall be to finish and hand over the said bridge by the aforesaid 31st day of May, 1916, completed according to the said agreement in writing, and the duty of the township shall be to accept and pay for the said bridge if finished in the manner provided in the agreement between the parties by the said 31st day of May, 1916.

"Now therefore these presents witness that it is agreed between the parties in consideration of the premises the contractor shall supply the necessary planking for flooring the said bridge for light traffic and lay the same and that the contractor shall complete the said bridge in the manner provided in the agreement between the parties except that the contractor shall have until the 31st of May, 1916, to complete the said bridge, and it is agreed that upon the contractor completing the said bridge on or before the 31st day of May, 1916, in the manner provided in the agreement between the parties, the township will accept and pay for the bridge as in the agreement between the parties provided, as if the same has been completed at the time fixed in the agreement between the parties. And it is agreed that the township, upon the completion of the said bridge, shall pay the contractor the cost of the said planking, and that otherwise this agreement shall not alter, change, or prejudice the rights of either of the parties in anywise whatsoever."

App. Div.
1918

WITHER-
SPOON
v.

TOWNSHIP
OF EAST
WILLIAMS.

Riddell, J.

App. Div.
1918

WITHER-
SPOON

v.

TOWNSHIP
OF EAST
WILLIAMS.

Riddell, J.

Obviously this agreement recognised the previously executed agreement, made modifications in its terms, but otherwise re-affirmed it, and provided that the use of the bridge for light traffic during the winter of 1915-1916 should not be construed as an acceptance of it.

The bridge was finished in due time, and the ordinary traffic of the road has been continuously passing over it. The only objection taken by the township to paying for the bridge is that, as they allege, it is not of 15-ton capacity—they assert that it is only of 10-ton capacity. Their counsel before us repudiated the proposition that they wished to retain from the plaintiff anything honestly earned, but would not assent to the Court deciding what should be paid. The learned trial Judge found the facts in favour of the plaintiff: but considered himself bound by authority to dismiss the action for want of a by-law of the council.

I do not think we are called upon to decide as to the necessity for a by-law—it is not pleaded, no amendment has been made, and none asked for even before us. Rule 183 does not compel us to amend *proprio motu*: amendments under that Rule are “to secure the advancement of justice,” not to enable a litigant to obtain a dishonest advantage. “The real matter in dispute” (see Rule 183), the real issue here, is—Did the plaintiff fulfil his contract?

In the consideration of this matter, we must remember that all parties contemplated a “15-ton capacity bridge;” to succeed, it is necessary for the plaintiff to prove that his bridge was a “15-ton capacity bridge.”

But, in interpreting that expression, we must give it in the same sense as that in which it was used by the parties to the contract. The learned trial Judge, on satisfactory evidence, has found that both parties used it as meaning “a bridge that could be crossed by a 15-ton threshing outfit;” and that the bridge in question is such a bridge.

On this finding of fact, the plaintiff should recover.

I would allow the appeal and direct judgment to be entered for the plaintiff as asked, with costs here and below.

SUTHERLAND, J., agreed with RIDDELL, J.

KELLY, J.:—If the rights of the parties are to be determined on the issues raised in the record, and if the findings of the trial Judge are adopted, then the case presents no difficulty,

By the endorsement on the writ of a summons, the plaintiff claimed \$2,500, with interest thereon from the 1st June, 1916, "balance due under a contract made between the plaintiff and the defendants for the construction and erection by the plaintiff for the defendants of a steel superstructure bridge, concrete substructure and floor, as approved and agreed upon by agreement in writing between the parties."

An affidavit made by Alexander MacIntosh, who, at the time the action was commenced, was the Reeve of the Township of East Williams, was filed, in which the only defence set up is, "that the bridge has not been completed according to the agreement between the municipal corporation and David Witherspoon, and that the money claimed in this action is not due and owing by the municipality of East Williams to the plaintiff David Witherspoon;" that the bridge which the defendants agreed to pay for was to be a bridge with a 15-ton capacity, and that the bridge constructed by the plaintiff is not of that capacity and does not approach nearly that strength.

The endorsement on the writ of summons and the affidavit constitute the record on which the action went to trial. On the defence thus set up, the controversy turned largely upon the interpretation of the contract as to the character of the bridge contracted for, and the trial Judge found in favour of the plaintiff's contention that what was meant by the contracting parties, when making the contract, was a bridge that could safely be used by a 15-ton threshing outfit, and that the bridge which the plaintiff built was sufficient for that purpose. The findings of the trial Judge are so supported by the evidence that it would be improper to attempt to disturb them.

On the record, judgment should, in my opinion, be in the plaintiff's favour. This was also the opinion of the trial Judge. He stated, however, that at the trial there was raised the additional defence that no by-law had been passed by the council of the municipality authorising the order for or accepting the bridge; and, disposing of the case on the defence so raised, he felt himself bound by the decision of the Appellate Division in *Mackay v. City of*

App. Div.
1918

WITHER-
SPOON

v.

TOWNSHIP
OF EAST
WILLIAMS.

Kelly, J.

App. Div.
1918

WITHER-
SPOON

v.
TOWNSHIP
OF EAST
WILLIAMS.

Kelly, J.

Toronto (1918), 14 O.W.N. 155, and now reported in 43 O.L.R. 17, 43 D.L.R. 263, to give judgment in the defendants' favour. While I think that on the record the plaintiff was and is entitled to succeed, I shall deal as well with the other defence on which the case was disposed of.

Section 249 of the Municipal Act (R.S.O. 1914, ch. 192) enacts that, except where otherwise provided, the jurisdiction of every council shall be confined to the municipality which it represents and its powers shall be exercised by by-law; and by sec. 460 it is provided that "every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it or upon which the duty of repairing it is imposed by this Act."

Mackay v. City of Toronto was decided on facts in several respects unlike those which arose in the present case. Here the municipal council, in pursuance of its duty to keep the highways of the municipality in repair, set about having built the bridge in question, which formed a part of one of the highways; it procured specifications and plans from an engineer, and obtained from the plaintiff a tender the acceptance of which was the subject of a resolution of the council; and later on a written contract, which the Reeve took to a meeting of the council, was signed by him and another member, and to it, the trial Judge says, the clerk, apparently with the assent of the members, affixed the seal; and a further agreement, also under the defendants' corporate seal, by which provision was made for temporary use of the unfinished structure for light traffic during the winter months, expressly referred to and recognised the original contract. In the following spring the bridge was completed, including certain work which the defendants' engineer, after an inspection, required to be done; the bridge was then put into permanent use, and the defendants paid a substantial part of the contract-price.

In *Mackay v. City of Toronto*, the trial Judge found that there was no contract, oral or written, between Mr. Mackay and the city corporation; that his employment was by the Mayor; and that no agreement as to remuneration was made. The council was not in any way consulted and had no knowledge of the matter until long after the work was undertaken; there was an entire absence of any action on the part of the council. The contract

was not an executed one, in the sense that the council, knowing the facts, accepted the result of Mackay's labours and ratified the agreement made by the Mayor. That was not done.

In these respects the two cases are clearly distinguishable. Leaving out of consideration for the moment the absence of a by-law authorising the contract, the plaintiff's case could not be stronger. But there is another ground of distinction of even greater moment, which would, in itself, distinguish the present from the *Mackay* case, even if in the latter the engagement of Mackay, instead of having been by the Mayor, had been by the council but without the authority of a by-law. This arises from a consideration of those instances where the statute imposes a compulsory duty upon municipal councils as contrasted with those which are not imperative. The work which Mackay performed, or was engaged by the Mayor to perform, was not a matter of obligatory duty of the council; it was a matter within its discretion. On the other hand, under sec. 460, building the bridge as a necessary means of keeping the highway in repair was a statutable duty; it was not discretionary with the council to repair or not. I do not understand that it is questioned that this bridge is upon or forms part of the highway, and that its erection was necessary to keep the highway in repair. I discuss the question on the assumption that this is conceded.

In *Pratt v. City of Stratford*, 16 A.R. 5, it was held that a municipal corporation can exercise and perform their statutable powers and duties in repairing highways or bridges or erecting a new bridge instead of an old and unsafe one without passing a by-law therefor. Hagarty, C.J.O., at p. 12, said, in reference to acts done by a municipality under their statutable powers and duties, that they had the right to do these acts without the formality of a by-law, as part of the ordinary duties imposed on them in the maintenance of roads and bridges. A perusal of the reasons for judgment in that case, and a reference to the authorities therein cited, throw much light upon the ground upon which the judgment proceeded, as it clearly indicates the class of undertakings which a municipal council can enter into without the formality of a by-law. That decision is still undisturbed. It was discussed by his Lordship the Chief Justice of Ontario, in *Taylor v. Gage* (1913), 30 O.L.R. 75, 16 D.L.R. 686. There the question arose as to what

App. Div.
1918

WITHER-
SPOON
v.

TOWNSHIP
OF EAST
WILLIAMS.

Kelly, J.

App. Div.
1918

WITHER-
SPOON
v.

TOWNSHIP
OF EAST
WILLIAMS.

Kelly, J.

was and what was not a work of repair. The learned Chief Justice, 30 O.L.R. at p. 85, says:—

“I do not think that the decision in the *Pratt* case is binding on this Court to the extent of requiring that we should hold that in all cases, and under all circumstances, an alteration of the grade of the highway by a municipal corporation is a work of repair which may be done without a by-law; but that the decision must be taken to have depended on the particular circumstances of that case; and that the Court was mainly influenced, in coming to the conclusion which it reached, by the fact that the raising of the level of the highway, of which the plaintiff complained, had become necessary owing to the raising of the level of the bridge, and was therefore practically a part of or incidental to that work.”

Assuming the work to be one of repair of the highway, neither *Pratt v. City of Stratford* nor *Taylor v. Gage* is in conflict with *Waterous Engine Works Co. v. Town of Palmerston* (1892), 19 A.R. 47 and 21 Can. S.C.R. 566, which has been urged as supporting the proposition that a by-law is necessary in such cases as the present one. Indeed, from a perusal of the reasons for judgment in the latter case, it will be seen that there was in mind a distinction between acts of the council which are discretionary and those which are obligatory. That action arose out of an alleged contract for sale by the plaintiffs to the defendants of a fire engine and hose. The alleged contract was signed by the Mayor of the town and by the clerk of the council; the seal of the corporation was attached, but no by-law was passed authorising the purchase. The engine was sent by the plaintiffs to the defendants, but was not accepted, and it was held that the want of a by-law was fatal and that the instrument under the seal of the corporation was invalid; the judgment resting upon two sections of the Municipal Act (R.S.O. 1887, ch. 184) then in force: sec. 282, which enacted that the powers of municipal councils should be exercised by by-law when not otherwise authorised or provided for; and sec. 480, which authorised the council to purchase fire apparatus etc., but said nothing about passing a by-law for the purpose. The Municipal Act of 1914, in respect of these matters, does not differ materially from the two sections referred to in the Municipal Act, R.S.O. 1887.

As has already been observed, sec. 460 of the Act now in force

imposes an obligation upon the council to repair—it is not discretionary. There are now, and there were when the *Waterous* case was decided, many sections of the Municipal Act conferring upon municipal councils the power to pass by-laws for the doing of a great variety of things, none of them compulsory. These powers are of a legislative character, which must be exercised by by-law. Certain other powers are administrative, in that the acts done in the exercise of them are merely in discharge of an imperative duty imposed by the statute.

The power possessed by the defendants in the *Waterous* case to purchase the fire apparatus which was the subject of that action was under sec. 480 of the Municipal Act then in force, which enacted that “every municipal council shall have power . . . to purchase or rent for a term of years or otherwise, fire apparatus of any kind, and fire appliances and appurtenances belonging thereto respectively.” No imperative duty was there imposed. The Court declared that the contract was executory only, and held that a by-law was necessary to support a valid contract—that a by-law could not be dispensed with.

A perusal of the reasons for judgment of the Court of Appeal makes it evident that that decision was not intended to apply to a case in which the act of the council is not discretionary, but compulsory, under the statute. Burton, J.A. (19 A.R. at p. 51), says:—

“As I endeavoured to point out in *Pratt v. City of Stratford*, 16 A.R. 5, a by-law is still necessary in every case (other than those expressly excepted), when it is not obligatory upon the corporation to do the act. In every case where the matter is discretionary with the council, the municipal corporation, in other words the ratepayers, cannot be bound except under a by-law of the council.”

Reference is also made to *Shawinigan Hydro-Electric Co. v. Shawinigan Water and Power Co.* (1912), 45 Can. S.C.R. 585, 4 D.L.R. 502, and the reasons for judgment in *Foster v. Reno*, 22 O.L.R. 413.

I have so far confined the reference to reported decisions to cases under the existing provisions of the Municipal Act, or provisions practically similar to those now in force. There are other decisions as well which indicate the principles to be applied

App. Div.
1918

WITHER-
SPOON
v.

TOWNSHIP
OF EAST
WILLIAMS.

Kelly, J.

App. Div.
1918

WITHER-
SPOON
v.

TOWNSHIP
OF EAST
WILLIAMS.

Kelly, J.

in determining whether or not a by-law is necessary to validate the action of a municipal council.

See *Croft v. Town Council of Peterborough* (1856-7), 5 U.C.C.P. 35 and 141. At p. 46, Macaulay, C.J., says:—

“I am not prepared to lay down any general rule touching the line of separation in matters of this kind, between cases in which a by-law may or may not be necessary. In my present impressions, cases of either kind may arise, according to the circumstances. Whatever is cast upon the defendants as executive duties, under the statutes, in relation to the maintenance or repair of the roads, or whatever is fairly included in those terms, they may do without a by-law: when not so, and it is only within their discretion in the exercise of their legislative powers, it would be otherwise.”

And at pp. 148, 149, he says:—

“If what was done could be regarded as necessary to maintain and keep the road in proper repair, and therefore incumbent upon the defendants, as a duty cast upon them by the statute . . . I have no doubt it could be justified without a by-law.”

This case was decided under a different state of the statute law; but the cases to which I have earlier referred, decided since the coming into force of the provision requiring the powers of the municipal council to be exercised by by-law, are authority to support the proposition that, on the facts of the present case, a by-law was unnecessary.

On these two grounds I am of opinion that the appellant is entitled to succeed: (1) on the record on which the action went to trial; and (2) that in the circumstances a by-law of the council was unnecessary. Confining my opinion to these, I do not discuss and I express no opinion upon any other grounds advanced in the argument.

The appeal should be allowed, the judgment appealed from set aside, and judgment be entered for the plaintiff for the amount claimed, with costs throughout.

Appeal allowed.

[LENNOX, J.]

1918

Dec. 31.

STONER v. SKENE.

Seduction—Action by Mother for Seduction of Daughter—Death of Father before Seduction—Remarriage of Mother—Stepfather Living at Time of Seduction but Dying before Action—Cause of Action—Seduction? Act, secs. 2, 3—Married Women's Property Act, sec. 4 (2)—Trustee Act, sec. 41.

This action was brought by a widow for the seduction of her daughter, a child of her first husband, who died before the seduction. Before the seduction, the plaintiff married again; her second husband was living at the date of the seduction, but died before the action was brought, and before the birth of the daughter's child:—

Held, having regard to the provisions of secs. 2 and 3 of the Seduction Act, R.S.O. 1914, ch. 72, of sec. 4 (2) of the Married Women's Property Act, R.S.O. 1914, ch. 149, and of sec. 41 of the Trustee Act, R.S.O. 1914, ch. 121, that the action was maintainable by the mother: the step-father was eliminated by the words of sec. 2 of the Seduction Act, "whether she remains a widow or has married again."

Entner v. Benneweis (1894), 24 O.R. 407, distinguished.

Whitfield v. Todd (1844), 1 U.C.R. 223, 224, 225, referred to for an exposition of the meaning of the original Seduction Act, 7 Wm. IV. ch. 8 (U.C.)

THIS was an action brought by Henrietta Stoner, plaintiff, against Alexander Skene, defendant, for the seduction of the plaintiff's daughter.

The statement of claim delivered by the plaintiff was as follows:—

1. The plaintiff is the widow of Edward Stoner, who was a labourer, and who died at the city of Toronto, in the county of York, on or about the 28th April, 1918, having lived there for at least the three years previously. The plaintiff *and the said Edward Stoner were respectively* the mother *and the father* of Elsie Ilene Stoner, who was born on or about the 7th October, 1902. The defendant is a cartage agent, and carries on his business at 185 Simcoe street, Toronto. (This paragraph was amended by the trial Judge by striking out the words italicised, by introducing the word "is" after "the plaintiff" at the beginning of the second sentence, and by substituting the word "Selden" for "Stoner" in naming the daughter.)

2. In or about the month of September, 1917, including on the 6th day of September, 1917, the defendant seduced the said Elsie Ilene Stoner, in the county of York, and in consequence thereof there was born to the said Elsie Ilene Stoner on or about the 11th June, 1918, a daughter, named Myrtle Audrey Stoner. (This paragraph was amended by changing "Stoner" to "Selden,")

1918
STONER
v.
SKENE.

3. The said defendant is the father of the last named person.

4. At all the dates previously mentioned, and between all of them, the said Elsie Ilene Stoner was residing with the plaintiff, in the city of Toronto, and rendered her, and, prior to the death of the said Edward Stoner, rendered him, services by working in their home, and contributed \$7 a week to the home.

5. In consequence of said seduction the plaintiff for a long time has lost the services of said Elsie Ilene Stoner, and incurred expense in medical attendance, care, delivery, and maintenance of her.

The plaintiff claimed \$5,000 damages.

December 21. The action was tried by LENNOX, J., and a jury, at a Toronto sittings.

The jury found for the plaintiff with \$3,000 damages.

The defendant moved for a nonsuit, and the plaintiff moved for judgment on the finding of the jury.

A. R. Hassard, for the plaintiff.

J. M. Godfrey and *T. N. Phelan*, for the defendant.

December 31. LENNOX, J.:—The plaintiff is a widow, and the action is for damages for the seduction of her daughter, a child of her first husband, who died before the seduction. Before the seduction, the plaintiff became the wife of one Edward Stoner, and he died before the action was brought, and before the birth of the illegitimate child, but he was living at the date of the seduction. There is no evidence as to the ownership of the house in which Mr. and Mrs. Stoner lived, if they lived together; but, although there is no direct allegation, there is sufficient in the statement of claim to raise the inference, and I will give judgment upon the assumption that they lived in the same house, and that they were living together at the time of the committing of the wrong complained of.

The daughter was a minor, only about 16 years of age when seduced.

The defendant, in addition to denying all the allegations of the statement of claim generally, and specifically denying that he seduced the plaintiff's daughter, pleaded that the statement of

claim disclosed no cause of action. After the evidence for the defence was all in, Mr. Phelan moved for a nonsuit, contending that the cause of action vested in the second husband, Stoner. Why this was not done at the close of the plaintiff's case, I do not know, nor is it to my mind important. I refer to it only in case a higher Court should be of a different opinion; which I do not anticipate.

Unless there has been quite recent legislation, the right of action for seduction in England has always been and is a purely common law right, and the basis of the cause of action has been the right of service and its actual or theoretical loss. This is so clearly recognised that, in his *Laws of England*, Lord Halsbury discusses "Seduction" not under the title of "Parent and Child," but exclusively under the heading of "Master and Servant." See Halsbury's *Laws of England*, vol. 20, pp. 270 to 275, paras. 627 to 635 inclusive; and this is emphasised as the law of England in the recent case of *Peters v. Jones*, [1914] 2 K.B. 781, where a married woman living with her husband brought action for the seduction of her adopted daughter, and failed, on the ground that the adopted daughter was the servant of the husband and not of the wife, and that the action for seduction was founded not on the relationship or quasi-relationship of parent and child, but on the relationship only of master and servant. See also *Hamilton v. Long*, [1903] 2 I.R. 407, affirmed on appeal, [1905] 2 I.R. 552 (C.A.) I am therefore entirely in agreement with Mr. Phelan's argument that the origin and basis of an action for seduction in this Province was the right to service and the interruption of the right through the act of the defendant; and that, at common law, the plaintiff's action upon the facts here disclosed—particularly as alleged in the statement of claim—must fail.

It is also true that if this case is not distinguishable from *Entner v. Benneweis* (1894), 24 O.R. 407, the plaintiff fails. In that case, the illegitimate child was born in 1890. The father of the girl seduced was alive at the time of seduction, the date of the defendant's wrongdoing (as was the plaintiff's second husband in this case), was alive at the birth of the child, and died without bringing action, in March, 1892. Upon these facts being disclosed at the trial, MacMahon, J., stopped the case, and this ruling was upheld upon appeal. Chancellor Boyd said (p. 409): "It is now suggested

Lennox, J.

1918

STONER

v.

SKENE.

Lennox, J.

1918

STONER

v.

SKENE.

that the case ought to go on in order that it may be proved that the daughter was servant to her mother during the life of the father on account of his helpless condition; and that the mother was really the head and support of the house." And, after pointing out that it was not suggested that the mother "had separate estate in which was the common abode, or that by some transaction apart from the husband, there was a condition of real service between her and her daughter," the learned Chancellor adds (pp. 409, 410): "Here the service of the daughter would be in law attributable to the father and not to the mother. That is, the common law right to service is given to the man who is deemed the head of the family. That relation is not changed because of his personal infirmity or decrepitude, as it is a legal result flowing from the family status. There is no divided right or co-ordinate right of control during the joint-lives; all is in the husband" (the father of the girl). "That being so, the right of action as master vested in him during his life, and it does not pass to his widow as such upon his death. There might have been a transmission to his personal representative under R.S.O. ch. 110, sec. 9" (now sec. 41 (1) of R.S.O. 1914, ch. 121); "but the year from his death has now elapsed."

And in *Hamilton v. Long*, in the King's Bench Division, O'Brien, L.C.J., said ([1903] 2 I.R. at pp. 411, 412): "Now" (the action being brought by the mother, a widow, for seduction which took place during the father's life), "at common law the action would not, in my opinion, be maintainable for this reason, namely, that to sustain an action of seduction it must be shewn that the act of seduction took place whilst the relation of master and servant existed, and that relation in the father's lifetime existed exclusively between the father as head of the family, and the daughter as his child, and one of the family and one of the household which he maintained. . . . Now, according to *Terry v. Hutchinson* (1868), L.R. 3 Q.B. 599, the right to the service would be, during the minority of the daughter, in the father exclusively; it was never pretended or suggested it could be in father and mother at the same time."

I see no escape from this as an exposition of the common law.

In the same case, Mr. Justice Gibson, at p. 414, said: "There is no trace of suggestion in English law books that a mother during

Lennox, J.

1918

STONER

v.

SKENE.

the father's lifetime could be regarded at common law as mistress jointly with her husband or separately. She was merged in her husband. In *Gray v. Jones*, Ir. Circ. R. 46, a wife was joined as co-plaintiff. Pennefather, B., held the misjoinder was fatal."

The same principle was followed in the judgment of Draper, C.J., on demurrer, in *Smith and Wife v. Crooker* (1863), 23 U.C.R. 84.

And (p. 416 of [1903] 2 I.R.) Gibson, J., said: "The father alone could complain of the wrong done in his lifetime. There is nothing to repel the ordinary inference and presumption that he was the master to whom his daughter's service was due. There was no suggestion of any separate estate or interest by virtue of which the mother could be regarded as mistress. I decline to invent a service to the mother, as mistress, which I believe did not exist. Hard cases make bad law, and fiction must stop somewhere."

We have direct legislation in Ontario dating back to 1837, 7 Wm. IV. ch. 8, touching the status of parents and postponing and limiting the right of a master by contract in suing for damages for the seduction "of an unmarried female who has been seduced"—creating statutory rights of action for the father and mother unknown to the common law, and incidentally, and specifically as well, abridging the common law contractual right of the master to maintain an action in derogation of the right of the parents of the girl seduced. And, indirectly affecting this action as well, we have legislation of more recent date, the Married Women's Property Act, now R.S.O. 1914, ch. 149, conferring upon a married woman the capacity of suing and being sued alone "either in contract or in tort or otherwise, in all respects as if she were a *feme sole*" (sec. 4 (2)), and the Trustee Act, R.S.O. 1914, ch. 121, sec. 41, eliminating the common law doctrine, *Actio personalis moritur cum personâ*; but it is true all the same that, with all our legislation, as was argued, there are still cases in which the Seduction Acts do not apply, as for instance *Entner v. Benneweis*, and that the conditions arising out of common law principles have not all been abrogated. And it is also true that in all matters affecting the status and rights of the plaintiff in the case at bar the statutes are essentially the same as they were in 1894, when the *Entner* case was decided.

Does the *Entner* case govern the plaintiff's rights in this action?

Lennox, J.

1918

STONER

v.

SKENE.

I am of opinion that it does not touch the question I have to decide. It was launched, attempted to be maintained, and decided as a common law action, and no statutory provision was, or could be, invoked in favour of the plaintiff. The deceased was *the father*, not the second husband of the mother, of the girl seduced, she was seduced in the lifetime of her father, and the cause of action vested in him, continued to be vested in him until his death, and—subject to an unsupported suggestion which I venture to append in a footnote—there was and is no statute which diverts or transmits a cause of action so vested in the father to the mother in the event of his death.

In the *Entner* case, Meredith, J., said (24 O.R. at p. 410): “It may be that a *de facto* relationship of master and servant would be enough to support this action: see *Harper v. Luffkin* (1827), 7 B. & C. 387; but there was no evidence of any relationship of master and servant, either in law or in fact, given in this case; and it is not contended that in this respect any further evidence could have put the plaintiff’s claim upon any higher or better ground . . . The allegation . . . that the wrong was done whilst the woman was servant of the defendant, might have been got over by an amendment of the pleading, if the facts warranted it.” (As, for instance, in *Rist v. Faux* (1863), 4 B. & S. 409, and 8 L.T.R. 737 (Ex. Ch.), where the father recovered damages although his daughter was a farm-labourer in the service of the defendant, but assisted in her father’s house, mornings and evenings, and slept there.) “But the absence of any relationship of mistress and servant between the mother and daughter” (the father being alive) “is fatal to the plaintiff’s claim.”

Neither is the case of *Hamilton v. Long* in point. Beyond the unquestionably well settled common law principle that the cause of action must in all cases be based on service or the right of service, and that this right is to be attributed to the father if living at the time of the seduction, the only question arising or discussed was whether the effect of the (English) Married Women’s Property Act *per se* created a contractual relationship of mistress and servant between a married woman living with her husband, and without separate estate, and *their* daughter, during the lifetime of the father—created in fact a fictitious cause of action unknown to the common law—a construction that, so far as I am aware, has never been contended for under our Act.

The scope of our Act, if I may say so with great respect, was put upon a satisfactory basis by the Chancellor in *Spahr v. Bean* (1889), 18 O.R. 70; and the contention of the defendant's counsel in that case as to the effect of omitting from the Married Women's Property Act, in the revision of 1887, the words "either in contract or in tort or otherwise," in reference to the capacity and liability of a married woman to sue and be sued, is eliminated by the incorporation of these words in the revision of 1914, as they were in the statute of 1884: see the Married Women's Property Act, R.S.O. 1914, ch. 149, sec. 4 (2).

But the plaintiff's right to sue is not solely or mainly dependent upon the common law. So far as the argument of counsel for the defendant goes only to the common law status of a father and the incidental incapacity of the mother, I agree. But the statutes must be squarely faced, and not only the specific enactments as to seduction but legislation providing for the survival of personal actions and the legal status of married women as well.

Section 2 of the Seduction Act, R.S.O. 1914, ch. 72, enacts: "The father, or, in case of his death, the mother, whether she remains a widow or has married again, of an unmarried female who has been seduced, and for whose seduction the father or mother could maintain an action if such unmarried female was at the time dwelling under his or her protection, may maintain such action for the seduction, notwithstanding that such unmarried female was, at the time of her seduction, serving or residing with another person upon hire or otherwise."

By sec. 3, upon the trial of an action brought by the father or mother, service shall be presumed, "and no evidence shall be received to the contrary."

It is contended that the cause of action vested in the second husband. I do not think so. The mother "has the meritorious cause of action." The second husband had no actual control—he was not affected by the defendant's wrong: *Actio non datur non damnificato*. He is completely eliminated by the distinct words of the statute—"whether she remains a widow or has married again." It matters not whether, as a matter of constructive law, the girl at the time was "dwelling under her (the mother's) protection" or was "serving or residing with another person" (the plaintiff's husband) or not, upon "*hire or otherwise*"—the statute

Lennox, J.

1918

STONER

v.

SKENE.

Lennox, J.

1918

STONER

v.

SKENE.

says, in language which is unmistakable, that "in case of," that is, in the event of, the death of the father, the mother may maintain the action whether she has or has not married again. It is undoubtedly true in a sense that the statute does not create a new cause of action for *either* the father or mother, for the words "for whose seduction the father *or* mother could maintain an action if," etc., must be kept in mind, but the mother of the girl "in case of the death of the father" is substituted as the plaintiff in derogation of the common law right which the second husband might otherwise have as head of the house at common law, if the words, "whether she remains a widow or has married again," are to have any effect.

In *Whitfield v. Todd* (1844), 1 U.C.R. 223, a judgment on demurrer under the statute of William, Chief Justice Robinson, at pp. 224-5, said: "I think the intention of the statute is clearly this, that where the father is dead, the mother shall be entitled to the action, wherever the daughter may be living at the time of being seduced . . . And the statute reserves to the father or mother this privilege, of suing in preference to any person not a parent for six months, after which period, if the parent has not sued, the master may. It does not appear, on the record, that *the* Isaac Whitfield suing here, is the husband of the mother, and if it did, the mother must nevertheless be joined, in order that the action might survive to her in case of her husband's death, as being the meritorious cause of action. Our statute referred to in these pleadings, 7 Wm. IV. ch. 8, places the remedy in cases of seduction on a new footing in several respects, and it is no answer to the defendant's plea to say that what he contends for is contrary to the law of England, for the Legislature has made and intended to make a change in the law—they considered that the real substantial injury for which the action is brought in cases of seduction, is the wound given to parental feelings, the disgrace and injury inflicted upon the family of the person seduced, and they reflected that this remedy was in practice often defeated by the inability to prove that the relation of master and servant did in truth subsist, at the moment of the trespass, between the parent and the child, by reason of the daughter being in fact their hired servant or an inmate in the family of some other person; so that a relation, which is rarely if ever made the real ground of the action, not infrequently became

Lennox, J.

1918

STONER

v.

SKENE.

the means of interfering with the real remedy which would otherwise have been in the power of the person whom the law, as it is administered in spirit, though not in form, does in truth look upon as the party injured, and this upon principles wholly apart from any actual relation of master and servant . . . The Act therefore reserves to the father, if he is living, in the first place the right to sue for the seduction . . . And in case of the death of the father, the same right is reserved to the mother, equally to the exclusion of any action for the injury by other persons, which might interfere with this remedy."

On the other hand, but for the words, "whether she remains a widow or has married again," first introduced in the Revision of 1887, the judgment of the Court on demurrer delivered by Draper, C.J., in *Smith and Wife v. Crooker*, 23 U.C.R. 84, might be argued as somewhat favourable to the contention of the defendant.

However, the question I have to determine is not directly involved in the decision of either of these cases, and the provisions of the statute have been amplified since then. In any event, it would not be right to quote the language of either of these eminent Judges as necessarily containing all they would have said in a action involving other questions of fact. The language of Chief Justice Robinson is significant, notwithstanding. I am however deciding the rights of the parties here on the best interpretation I can give of the statute as it is, and upon a question not hitherto presented, so far as I have been able to ascertain. The statutes—all of the statutes I have referred to—are remedial, and intended to do away with some of the hardships and injustice incident to the "fictions" and "suppositions" of the common law. The Seduction Acts have been progressively remedial, and are to be interpreted liberally, but subject, of course, to the fundamental rule that all statutes are to be construed in harmony with the language used as well as with reference to the evil and its redress.

The intention to set off legislation against fiction is manifest both in the recitals and enactments of 7 Wm. IV. ch. 8, and if the intention was not then sufficiently expressed to eliminate the second husband, it is now. A legal fiction, according to Burrill, is "an assumption of a possible thing as a fact, which is not literally true, for the advancement of justice, and which the law will not allow to be disproved, so far as concerns the purpose for which the

Lennox, J.

1918

STONER

v.

SKENE.

assumption is made." Legal fictions are not always set up "for the advancement of justice," to wit, in this case. "Fiction must stop somewhere," as said by Gibson, J., in the *Hamilton* case, above referred to; and it seems to me that the Legislature has said *where* in this instance—has plainly said that it shall stop short of attributing the service to a second husband; and, paraphrasing the language of the same learned Judge, "I decline, in the face of the statute, to invent a service to the second husband which I believe did not exist." The girl was earning weekly wages, which she handed over to her mother.

Owing to the singular ability and clearness with which Mr. Phelan supported his submission, and his evident earnestness and conviction, I have gone into this matter more fully than I otherwise would have done.

I have amended paras. 1 and 2 of the statement of claim in accordance with the facts as they went to the jury. The 4th paragraph is not worded exactly as it should be upon the facts disclosed, but it is, I think, sufficient after verdict; and particularly having reference to the time of the defendant's motion, and that no reference was made to the pleadings.

There will be judgment for the plaintiff upon the finding of the jury for \$3,000, with costs.

Note: But for the decision in *Entner v. Benneweis* I would have been disposed to interpret sec. 2 of the Seduction Act as substituting the mother as plaintiff in the event of the death of the father, whether it occurred before or after the seduction; as conferring a statutory cause of action upon each for a wrong equally affecting both in fact, and as the law is administered, although not equally according to the theory of the common law; and as only postponing the right of the mother to sue during the lifetime of the father. This construction of the statute was not advanced by the plaintiff's counsel, as reported, and perhaps became manifestly untenable; but at all events I have necessarily lost confidence in it by reason of the concurrent opinions of the three distinguished Judges who gave judgment. The decision is, of course, binding on me, and I shall cheerfully follow it should occasion arise for its application.

[ROSE, J.]

1918

Dec. 31.

MATHESON v. TOWN OF MITCHELL.

Will—Devise of Lands to Town Corporation for Public Park—Acceptance on Conditions of Will—Condition that Park be Kept in Proper Order and Repair—Breach—Action for Mandatory Order to Compel Corporation to Perform Condition—Obligation to Superintend Performance not Assumed by Court—Forfeiture for Breach—Claim for Declaration—Continuous Breach Beginning more than 10 Years before Action—Limitations Act, R.S.O. 1914, ch. 75, secs. 5, 6 (9).

A testator, who died in 1883, devised lands to a town corporation, the defendants, and their successors for ever, to be used and kept as a place of recreation and amusement for the inhabitants of the town for ever, and to be called "M. Park," with a proviso that if the corporation should neglect or refuse "to keep the same and the fences surrounding it in proper order and repair and as a public park should be kept I hereby in that event cancel the said gift and direct that the said lands shall revert to and form part of my estate." The town council accepted the gift, on the conditions of the will. In this action, brought in 1918, by the executor of the testator, to compel the defendants to perform the condition, or for a declaration that the title to the land had reverted to the estate, it was found that there had been a continuous breach of the condition, beginning more than 10 years before action:—

Held, that a judgment in the nature of a mandatory order could not be pronounced, for that would involve the assumption by the Court of the obligation of superintending for all time to come the performance of continuous duties, in the performance of which the exercise of a certain amount of discretion must necessarily be allowed to the defendants—an obligation which the Court does not assume.

Bickford v. Town of Chatham (1889), 16 Can. S.C.R. 235, followed.

Held, as to the alternative claim, that there was one breach, continuing over many years, of the condition, and the time for commencing the action founded upon that breach expired at the end of 10 years after the breach had begun.

Sections 5 and 6 (9) of the Limitations Act, R.S.O. 1914, ch. 75, considered.

ACTION by the surviving executor of the will of Thomas Matheson for a mandatory order compelling the defendants, the Municipal Corporation of the Town of Mitchell, to keep in proper order and repair, and as a public park should be kept, a certain piece of land devised to them by Thomas Matheson for park purposes, or, in the alternative, for a judgment declaring that the lands had reverted to the testator's estate.

November 12 and 13. The action was tried by ROSE, J., without a jury, at Stratford.

J. C. Makins, K.C., for the plaintiff.

F. H. Thompson, K.C., for the defendants.

Rose, J.

1918

MATHESON
v.
TOWN OF
MITCHELL.

December 31. ROSE, J.:—Thomas Matheson died in 1883. By his will he devised to the defendants the lands in question, which are a short distance outside the limits of the corporation; the words of the devise, including the condition or proviso upon which the action is based, being as follows:—

“I give and devise to the Corporation of the Town of Mitchell in the County of Perth lots numbers 7 and 8 . . . in the first concession of the Township of Fullarton . . . to have and to hold to the said Corporation of Mitchell and its successors in office for ever and to be used and kept as a place of recreation and amusement for the inhabitants of the said Town of Mitchell for ever and to be called and known as the Matheson Park: Provided that if the said corporation neglects or refuses to keep the same and the fences surrounding it in proper order and repair and as a public park should be kept I hereby in that event cancel the said gift and direct that the said lands shall revert to and form part of my estate.”

A few months after the death of the testator, the town council passed a resolution that the executors be advised that the town accepted the gift with thanks, on the conditions of the will. Possession was taken upon behalf of the town, and has ever since been retained.

Mitchell is a small town, with a population, according to one of the witnesses, of some 1,700 or 1,800 persons; the land, as I have mentioned, is outside the boundary; there is a park in the town itself; and “Matheson Park,” if it is or can be made use of as a park, will be useful, not as a place in which the wayfarer in the town can occasionally stop and rest, but as a place in which school picnics, sports, etc., can be held. No one suggests, therefore, that the will means that the land is to be put or kept in the condition in which a park or square in a town should be kept; but the plaintiff says, and I think the evidence quite justifies him in saying, that, from at latest a year or two after the death of the testator, there has been continuous neglect upon the part of the municipality to make any real effort to keep the property in order or repair, or as a public park, situated outside the municipality and intended only for such use as is above suggested, should be kept. Trifling sums have been spent from time to time—once the making of a road was commenced, but now the road can hardly be found; sometimes

some weeds have been cut, but more often the growth has been unchecked; some trees have been cut, and probably some judgment was shewn in marking those that were to come down; latterly some fencing has been done, but these attempts at repair or upkeep have been spasmodic, and sometimes they have been the result of complaints made by the plaintiff, who has been protesting, throughout the 35 years that have elapsed since his brother's death, that the town was not living up to the terms of the will. All of the money spent on the "Park" during the period seems to be less than the \$350 realised lately from the sale of trees. As I have said, then, I think the plaintiff is justified in his statement that there has been a continuous breach of the condition. The question is: What remedy, if any, is available to him? He seeks either a mandatory order that the defendants perform the condition, or a declaration that the title to the land has reverted to the estate which he represents.

Leaving aside all question as to whether, if there was to be a decree that the defendants should keep the park and its fences in proper order and repair, that decree would be a mandatory order such as was formerly made in the Court of Chancery, and, if so, whether the plaintiff has a legal right in support of which the decree might properly be made, or whether the remedy would be the issue of the prerogative writ of mandamus, which is not directed in an action (as to which see *Rich v. Melancthon Board of Health* (1912), 26 O.L.R. 48, 2 D.L.R. 866), I think it is clear that no such decree as is sought can be made, for the simple reason that if it was made the Court would have to assume the obligation of superintending for all time to come the performance of continuous duties, in the performance of which the exercise of a certain amount of discretion must necessarily be allowed to the defendants—which is an obligation that the Court does not assume. See the judgment of Ritchie, C.J., in *Bickford v. Town of Chatham* (1889), 16 Can. S.C.R. 235.

As an answer to the other claim, the claim for a declaration that the title to the land has reverted to the estate, the defendants plead the 5th section of the Limitations Act, R.S.O. 1914, ch. 75, which enacts that no action shall be brought to recover any land but within 10 years next after the right to bring such action first accrued.

Rose, J.

1918

MATHESON

v.

TOWN OF
MITCHELL.

Rose, J.
1918
MATHESON
v.
TOWN OF
MITCHELL.

Section 6 (9) enacts that where the person claiming such land has become entitled by reason of any forfeiture or breach of condition such right shall be deemed to have first accrued when such forfeiture was incurred or such condition broken. Now there is no doubt that the condition was first broken more than 10 years before the commencement of the action, but on behalf of the plaintiff it is pointed out that sec. 6 (9) does not say that the right shall be deemed to have first accrued when such forfeiture was *first* incurred or such condition was *first* broken; and it is argued that there have been continuous or repeated breaches of the condition, and that the plaintiff, waiving, or having waived, the breaches which occurred more than 10 years before the commencement of his action, is entitled to rely upon the recent breaches, and that the statute has no application. No authority for this proposition was cited, and I have not succeeded in finding a case directly in point. Cases like *Spoor v. Green* (1874), L.R. 9 Ex. 99, in which Cleasby, B., expressed the opinion that an action upon a covenant for title, which covenant was broken at the moment it was entered into, by reason of the fact that the covenantor had previously granted a lease of coal mines under the land, would lie, notwithstanding the statute, whenever the covenantee sustained damage by reason of the breach, and other cases decided upon the statute 3 & 4 Wm. IV. ch. 42 (R.S.O. 1914, ch. 75, sec. 49), seem to me to depend upon entirely different considerations; and one is compelled to determine the present case upon the wording of sec. 6 (9) alone, without assistance from the authorities.

Upon the words as they stand, it seems to me that the plaintiff's contention is not well-founded. The right to bring *an* action to recover the land accrued to him much more than 10 years ago, when the condition was first broken by the defendants' neglect to keep the park as a public park should be kept; and, finding, as I do, that that neglect has been continuous, it seems to me that I should be straining the facts and taking a very narrow view of the meaning of the statute if I held that the present action was not *the* action which the plaintiff might have brought as soon as the neglect was manifested, but another action founded upon another neglect. What the result would be if, instead of persistent neglect to perform certain continuous duties, there were a number of

isolated breaches of a negative condition, as, e.g., not to allow horse-racing in the park, I do not stop to consider: I deal only with the present case, in which, as already stated, there seems to be one breach, continuing over many years, of the condition mentioned; and it seems to me that the time for commencing the action founded upon that breach expired in 10 years after the breach had begun.

Neither of the remedies sought by the plaintiff being available to him, the action fails and will be dismissed with costs.

[MIDDLETON, J.]

SNOW V. CITY OF TORONTO.

Municipal Corporations—Land Entered upon and Excavated for Sewer—Drainage System—By-law Passed in 1913—Intra Vires—Municipal Act, 1903, secs. 2 (8), 554—Expropriation of "Easement"—Compensation—Damages.

On the 10th February, 1913, the council of the defendants, a city corporation, passed a by-law which, after reciting that it had become necessary to acquire an easement over certain lands described "for the right of way of the . . . drainage system," authorised the city engineer to proceed with the construction of sewers across the lands described, to enter upon the lands, etc.:—

Held, that, under sec. 554 of the Municipal Act of 1903, 3 Edw. VII. ch. 19, which was the Act in force when the by-law was passed, and sec. 2 (8) of that Act, which interpreted "land" as including "lands, tenements and hereditaments, and any interest or estate therein, or right or easement affecting the same," the council had power to pass the by-law.

The right to construct the sewer upon the land of another was not in strictness an easement, but an hereditament. The intention of the statute, however, as shewn by *Re Davis and City of Toronto* (1891), 21 O.R. 243, decided under the Municipal Act in force in 1891, R.S.O. 1887, ch. 184, and by the amendment made in 1892, 55 Vict. ch. 43, sec. 1, embodied in sec. 2 (8) of the Act of 1903, was to enable a municipality to take the right to construct a sewer through land without taking the land itself; and there was no reason why a municipality should be compelled to acquire absolute title to the lands through which the sewers were to pass.

Pinchin v. London and Blackwall R.W. Co. (1854), 5 DeG. M. & G. 851, *Metropolitan R.W. Co. v. Fowler*, [1892] 1 Q.B. 165, and *In re Prittie and Toronto* (1892), 19 A.R. 503, referred to.

In an action for trespass, for an injunction, and other relief, brought by one of the persons whose land was entered upon and broken up by the defendants, in pursuance of the by-law, it was declared that the by-law was *intra vires* the defendants and that the plaintiff was entitled to compensation, to be determined under the Municipal Act, for all that was authorised by the by-law, and to damages for anything done beyond what was authorised.

ACTION for a mandamus to the defendants, the Corporation of the City of Toronto, to compel the closing of a sewer, for an injunction restraining the defendants from operating the sewer, and for damages for trespass to the plaintiff's land.

Rose, J.

1918

MATHESON
v.
TOWN OF
MITCHELL.

1919

Jan. 2.

1919
SNOW
v.
CITY OF
TORONTO.

December 19, 1918. The action was tried by MIDDLETON, J., without a jury, at a Toronto sittings.

W. J. Elliott, for the plaintiff.

Irving S. Fairty, for the defendants.

January 2, 1919. MIDDLETON, J.:—The plaintiff owns land on the east side of Balsam avenue, fronting on Lake Ontario. In the spring of 1913, the Corporation of the City of Toronto, as part of the East Toronto drainage system, entered upon these lands and excavated a trench across them from east to west, a distance of 100 feet, and constructed a sewer, filling in the trench and in some measure restoring the surface of the ground.

The entry upon the lands is justified by the defendants upon the strength of a by-law, No. 6347, passed on the 10th February, 1913, intituled "A By-law to Acquire an Easement over Certain Lands &c.," and reciting, "Whereas it has become necessary to acquire an easement over the lands hereinafter described for the right of way of the East Toronto drainage system."

The by-law then enacts:—

I. "That the city engineer be and he is hereby authorised and empowered . . . to proceed forthwith with the construction of the said sewers across the lands hereinafter described and . . . to enter upon, break up, fill in, use and occupy . . . so much of the said lands as may be necessary for the purposes aforesaid during the time of the carrying out and completion of the said work or improvement and from time to time and at all times thereafter whenever it may be necessary for inspection repair and maintenance of said sewer"

II. "The owner or occupants of the said lands may fill up over the said sewer, but shall not be entitled to erect any buildings or do other work over the same so as to injure or endanger the said sewer."

III. "It is hereby declared that the said corporation shall acquire no estate or interest in the lands hereinafter described except as set out in this by-law."

IV. This section describes the lands as being a strip 10 feet wide, 5 feet on each side of a centre line on the plan, and, "during construction only, two further strips 5 feet in width on either side of the 10-foot strip."

Section V. imposes a penalty of \$50 for breach of the by-law, and sec. VI. provides for pulling down buildings erected contrary to its provisions.

It is admitted that compensation must be paid under the Municipal Act, and it is agreed that a claim for damages for things done beyond what this by-law authorises shall be referred so as to be dealt with at the same time, if the by-law stands.

The plaintiff contends that this by-law is *ultra vires* the city council.

In *Re Davis and City of Toronto* (1891), 21 O.R. 243, the present Chief Justice of the King's Bench dealt with a by-law precisely similar in all matters of moment to the by-law in question, and held it to be unauthorised by the Act as it then stood. Unless the statute has been changed, or the authority of this case has been shaken, it is my duty to follow it. The statute as it then stood (Municipal Act, R.S.O. 1887, ch. 184, sec. 479, para. 15) authorised the passing of by-laws for opening sewers and "for entering upon, breaking up, taking or using any land in any way necessary or convenient for the said purposes." The by-law, it is said (21 O.R. at p. 245), did "not assume to take or expropriate land or any interest in land, but . . . to confer right of entry on the city and its servants, for all time," and "prohibits the owner from exercising . . . the ordinary rights of ownership over his own land," and (p. 246) "assumes that the corporation has the right to expropriate the easement, and to determine the price thereof by arbitration." The statute, it is said (p. 247), did not authorise this; if it did authorise "the taking of an easement, much more would it authorise the taking of land for an estate less than freehold or less than the estate of the owner," which "will hardly be contended for."

The legislation in the next year, 1892, 55 Vict. ch. 43, sec. 1, amended the statute (R.S.O. 1887, ch. 184, sec. 2 (7)) by providing that "Lands" shall include "any interest or estate therein or right or easement affecting the same." Biggar, who was counsel in the *Davis* case, in his Municipal Manual, p. 34, says that this amendment was in consequence of that decision.*

*The Municipal Act, R.S.O. 1887, ch. 184, sec. 2 (7), enacted as follows: "Land," "Lands," "Real Estate," "Real Property," shall, respectively, include lands, tenements and hereditaments, and all rights thereto and interests therein.

The Municipal Amendment Act, 1892, 55 Vict. ch. 43, sec. 1, amended para. 7 of sec. 2 of the principal Act, by substituting for the words "and all

Middleton, J.

1919

SNOW

v.

CITY OF
TORONTO.

It is argued that the amendment has not the effect attributed to it, as all that the municipality may do under the statute, as it now stands, is to expropriate an existing easement; and that the municipality cannot now, any more than it could before the amendment, take any lesser estate than that owned. It is singular that in the *Davis* case no attention was drawn to the interpretation clause as it then stood, which enacted that "land" included "lands, tenements and hereditaments, and all rights thereto and interests therein."

It is clear that a statute which authorises a public body or a private enterprise to take land belonging to another, making compensation, does not authorise the taking of an easement or any incorporeal hereditament—land *primâ facie* meaning corporeal hereditaments: *Pinchin v. London and Blackwall R.W. Co.* (1854), 5 DeG. M. & G. 851.

In the case of *In re Prittie and Toronto* (1892), 19 A.R. 503, the Court had to deal with a by-law passed in 1884 in practically the same form as the by-law in the *Davis* case and the by-law here. Osler, J.A., says (p. 532): "How far a municipality is authorised to acquire an easement or quasi-easement of this kind compulsorily, or to pass a by-law containing the extraordinary provisions I have referred to, it is unnecessary to determine." Maclellan, J.A., says (pp. 517, 518, 519): "It was contended that the corporation had no power to expropriate an easement and *Re Davis and City of Toronto*, 21 O.R. 243, was cited in support of that contention. It is plain, however, that what was authorised by those by-laws . . . was not the expropriation of an easement. An easement must be appurtenant to some tenement. There must be a dominant tenement to which it is appurtenant and a servient tenement to which it is subject. . . . What is taken here is a right in and

rights thereto and interests therein" the words "and any interest or estate therein or right or easement affecting the same."

And in the Municipal Act, 1903, 3 Edw. VII. ch. 19, which was the Act in force when the by-law was passed, sec. 2 (8) read: "Land," "Lands," "Real Estate," "Real Property," shall include lands, tenements and hereditaments, and any interest or estate therein, or right or easement affecting the same.

Section 554 of the Act of 1903 provided that by-laws might be passed by the councils of municipalities (1) "for opening, making . . . drains, sewers or watercourses . . . and for entering upon, breaking up, taking or using any land in . . . the municipality in any way necessary or convenient for the said purposes; . . . but subject always to the payment of compensation to persons who may suffer injury therefrom . . ."

out of the lands in question, which the Legislature has authorised the corporation to take and exercise for the benefit of the public. . . . The corporation took no more than they were entitled to take, and took as much as they were obliged to take. They were not obliged to take the lands absolutely. They might have done so, but were not compelled to do it. By the interpretation clause in the Act the word lands includes all rights thereto and interests therein; and applying it to section 479 (15), the corporation is thereby enabled to take any right or interest less than the whole which suits their purpose in any case. . . . The sewer . . . became and is the property of the corporation, with an easement appurtenant thereto of repair and maintenance."

Middleton, J.

 1919

 SNOW
 v.
 CITY OF
 TORONTO.

If this view of the statute is to be accepted, then the amendment need not be considered. The right to build the sewer is not in strictness an easement, but an hereditament (*Metropolitan R.W. Co. v. Fowler*, [1892] 1 Q.B. 165); but in the statute of 1892 the Legislature has followed the lead of the Judge in calling the right taken an easement; and, if necessary, I should have no hesitation in holding that the intention was to enable the municipality to take the right to construct a sewer through land without taking the land itself. In the *Pinchin* case, *supra*, the right which was attempted to be taken was in the same way inaccurately called an easement; and in Browne & Allan's work on Compensation, 2nd ed., p. 28, the acquisition of a right such as this is called "creating an easement." In Halsbury's Laws of England, vol. 11, para. 470, it is said: "An easement is a right which a person has to utilise certain land belonging to another in a particular manner" In para. 471, the necessity of an easement being appurtenant to a dominant tenement is pointed out.

"The meaning of particular words in Acts of Parliament, as well as other instruments, is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained:" *Rex v. Hall* (1822), 1 B. & C. 123, 136.

There is no hardship in allowing the defendants to construct the sewer across the plaintiff's land without acquiring the absolute ownership. Compensation must be paid, and it may amount to a sum approximating the full value of the land in question, or it may

Middleton, J.

1919

SNOW

v.

CITY OF
TORONTO.

amount to very little. No advantage would accrue to the plaintiff by compelling the defendants to take an absolute title to the lands in question. This severance of the entire estate would do grievous harm and compel the defendants to pay heavy damage instead of a comparatively small sum. Much that is said in *Roderick v. Aston Local Board* (1877), 5 Ch. D. 328, applies here.

Sight must not be lost of the true situation. Why should a municipality, charged with the duty of maintaining a sewer system, be compelled to acquire absolute title to land at a great expense and serious damage, when an underground passage, doing little harm, is all that is needed? Why not impute a reasonable rather than an unreasonable intention to our omnipotent Legislature?

The proper disposition of the case is to declare that the by-law is *intra vires* the corporation, and that the plaintiff is entitled to compensation to be determined under the Municipal Act for all that was authorised by the by-law, and to damages for anything done beyond what was authorised, this damage to be assessed and determined by the arbitrator, as special referee, at the same time as the arbitration is held.

Costs reserved until after report.

1919

[IN CHAMBERS.]

Jan. 4.

NEWCOMBE v. EVANS.

Costs—Taxation—Appeal—Items Disallowed by Local Officer—Fees Paid to Witnesses Examined upon Foreign Commission—Preparation for Trial—Costs Thrown away by Reason of Postponements of Trial—Special Order for Payment—Tariff “A,” Item 6—Allowance for Correspondence—Tariff Item 16—Costs of Interlocutory Motions for Postponements—Expert Witnesses—Preparation of Photographs—Rule of 24th December, 1913—Fees Paid to Foreign Witnesses—Reasonable and Necessary Payments—Evidence—Reconsideration of Items by Principal Taxing Officer.

Upon appeal by the defendant from the taxation by a local officer of her costs of the trial of the action, it was *held*:—

- (1) That a *prima facie* case for the allowance of fees paid to witnesses examined upon commission in the State of Massachusetts was made by the filing upon the taxation of an affidavit of an attorney practising in Massachusetts that the disbursements were necessarily made; and, in the absence of contradiction, if it appeared to the satisfaction of the officer that it was necessary or reasonable to examine the witnesses, the fees should have been allowed. This item should be reconsidered by the principal Taxing Officer, and upon the reconsideration either party should be at liberty to adduce further evidence of the law of Massachusetts.
- (2) The case was on the list for trial at each of the sittings held in September, 1916, November, 1916, and January, 1917, and was tried in May, 1917. A fee of \$50 was allowed (upon the fiat of the principal Taxing Officer) for

preparation for trial at the sittings of September, 1916. There is no indication in tariff "A" of an intention that, in the absence of special order, costs of preparation for trial wholly or partly thrown away by a postponement should be allowed; nor that, in the absence of special order, there should in any circumstances be more than one fee for preparation for trial (item 6 of tariff). In January, 1917, the order postponing the trial awarded to the defendant the costs thrown away by the postponement; and this entitled the defendant to payment for such of the services covered by item 6 as were performed specifically with reference to the expected trial, and were thrown away by the postponement. As to this there should be a reconsideration. There was no special order for costs in respect of the other postponements, and none authorising the allowance of a fee for preparation for the trial in May, 1917. The one fee taxable in virtue of item 6 had been allowed; the tariff allowed it only once, and the Taxing Officer, having allowed it where it first appeared in the bill, had no authority to allow it again.

- (3) In addition to a \$10 fee taxed under tariff item 16, the defendant claimed an allowance for correspondence necessitated by the postponements. This should not be allowed except under a special order. If any correspondence was thrown away by the postponement in January, 1917, the defendant was entitled to payment for it under the order then made, and there should be an extra allowance unless the \$10 allowed fairly covered all the correspondence in the course of the action, including that necessitated by the postponement of January, 1917. This must be reconsidered.
- (4) The costs of contested interlocutory motions in Court for the postponements of November, 1916, and January, 1917, were properly disallowed: there was no order for the payment of them, and the officer had no authority to tax them.
- (5) Expert evidence was given at the trial as to whether a disputed signature was genuine, and the expert witnesses prepared photographs of the disputed signature and other signatures proved to be genuine, and in their testimony referred to these photographs. Whether some or all of the photographs were reasonably "necessary for the due understanding of the evidence," so as to warrant the allowance of a reasonable sum for the preparation of them, under the Rule of the 24th December, 1913, was something to be determined upon the taxation. Other photographs were of documents which could not be produced at the trial. If it would have been proper to use the documents, it was proper to use the photographs; and the officer should have dealt with each on its merits. The question of an allowance for both classes of photographs should be reconsidered.
- (6) The defendant claimed fees paid to foreign witnesses brought to the place of trial in November, 1916, January, 1917, and May, 1917. There having been no award of the costs occasioned by the postponement of the trial in November, 1916, no allowance could be made for the witnesses then brought to the place of trial. The defendant was entitled under the order of January, 1917, to the costs then thrown away, and under the judgment to the costs of the trial in May, 1917. These costs the officer taxed, and in taxing them professed to apply the rule stated in *Ball v. Crompton Corset Co.* (1886), 11 P.R. 256, and to allow whatever had been reasonably and necessarily paid to the witnesses respectively. Confusion having arisen in applying the rule, there should be reconsideration, and new evidence should be allowed to be given.

1919
 ———
 NEWCOMBE
 v.
 EVANS.

AN appeal by the defendant from the certificate of the Local Registrar at Sandwich, upon the taxation by him of the defendant's costs of the trial, pursuant to the judgment pronounced at the trial, as varied by the order made by a Divisional Court on the 23rd April, 1918: *Newcombe v. Evans*, 43 O.L.R. 1.

1919
NEWCOMBE
v.
EVANS.

November 21, 1918. The appeal was heard by ROSE, J., in Chambers.

Frank McCarthy and *A. H. Foster*, for the defendant.
J. H. Rodd, for the plaintiff.

January 4, 1919. ROSE, J.:—*Item 1*: Fees of witnesses examined upon commission at Haverhill, Mass.

The reason for the disallowance of these fees is not stated in the Taxing Officer's certificate of his revision of the taxation; but it is suggested that the reason was that there was no proof that, under the law of Massachusetts, the payment of these or any other fees was requisite in order to compel the attendance of the witnesses. There is, however, an affidavit by an attorney practising in Massachusetts that the disbursements were necessarily made. This, I think, made a *prima facie* case, and, in the absence of any contradiction, would have justified the allowance of the fees, subject, of course, to its appearing to the satisfaction of the Taxing Officer that it was necessary or reasonable to examine the witnesses. This item must be reconsidered, and upon the reconsideration either party may, if so advised, adduce further evidence as to the law of Massachusetts.

Item 2: Costs of a motion, made at the trial, to strike out a portion of the statement of defence.

This motion was not abandoned, as the defendant contends it was; and, there being no order awarding the costs of it, I dismissed the appeal at the hearing.

Items 3, 4, 7, and 10: Conduct-money, Maud Gauthier.

The witness was not called at the trial, and the affidavit of disbursements is silent as to the necessity of having her at the trial. I dismissed the appeal at the hearing.

Items 5, 8, and 12: Preparation for trial.

The case was on the list for trial at the sittings held in September, 1916, November, 1916, and January, 1917, and was finally tried in May, 1917. A fee of \$50 was allowed, upon the fiat of the Taxing Officer at Toronto, for preparation for trial at the sittings of September, 1916. The defendant claims a fee of \$25 for each of the other three sittings.

I do not find in the Tariff "A" any indication of an intention that, in the absence of special order, costs of preparation for trial

wholly or partly thrown away by a postponement of the trial shall be allowed; nor do I find any indication that, in the absence of special order, there shall under any circumstances be more than one fee for preparation for trial (Tariff "A," item 6).

In November, 1916, the trial was postponed by the order of Mr. Justice Middleton, the costs of the motion for the postponement and of the order being reserved to be disposed of at the trial. The judgment pronounced does not deal with these costs, and the defendant has no order for the payment of costs thrown away; so that I think the appeal must fail as to preparation for trial on this occasion.

In January, 1917, the postponement was ordered by Mr. Justice Latchford, who by his order awarded to the defendant the costs thrown away by the postponement. This entitles the defendant to payment for such of the services covered by the tariff item 6 as were performed specifically with reference to the expected trial in January, 1917, and were thrown away by the postponement, and there must be a reconsideration of item 8 of the objections. I see no reason why a reasonable fee for such of the services covered by tariff item 6 as are thrown away should not be taxed under an order such as that of Mr. Justice Latchford, the amount of the allowance, of course, being arrived at upon a consideration of what portions of the services intended to be covered by the tariff item of \$25 have, in fact, been performed and have been rendered useless by the postponement.

The appeal against the disallowance of a fee for preparation for the trial in May, 1917, fails. There is no special order for such an allowance, and the one fee taxable in virtue of tariff item 6 has been allowed. It is true that it was allowed specifically in respect of the September, 1916, sittings; but that fact must be disregarded. The tariff allows it once only, and the Taxing Officer, having allowed it where it first appeared in the bill, had no authority to allow it again.

Item 13: Correspondence.

It is claimed that, in addition to the \$10 taxed under tariff item 16, there ought to be an allowance for correspondence necessitated by the postponements of the trial. What has been said with reference to the fee for preparation for trial applies equally

Rose, J.

1919

NEWCOMBE

v.

EVANS.

Rose, J.1919

NEWCOMBE

v.

EVANS.

to this. If there was any correspondence thrown away by the postponement in January, 1917, the defendant is entitled to payment for it under Mr. Justice Latchford's order, and there ought to be an extra allowance unless the \$10 allowed fairly covers all the correspondence pending the suit, including that in question. This item must be reconsidered.

Items 6 and 9: Contested interlocutory motions in Court for postponement, the 27th November, 1916, and the 24th January, 1917.

There is no order awarding these costs. As already stated, Mr. Justice Middleton's order of November, 1916, reserves the costs of the motion and of the order to be disposed of at the trial, but the judgment pronounced at the trial does not deal with these costs, while Mr. Justice Latchford's order of January, 1917, contains no provision for the costs of the motion, but does award a counsel fee of \$50, as part of the costs thrown away by the postponement—which fee has been taxed. The Taxing Officer, therefore, had no authority to tax the costs claimed, and the appeal fails.

Item 11: Disbursements for photographs.

Expert evidence was given as to whether a disputed signature was genuine. As is often done in such cases, the expert witnesses prepared photographs, some of them of the same size as the originals, and others enlargements of the signature in question and of other signatures proved to be genuine, and in giving their evidence referred to these photographs, rather than to the original signatures. Doubtless, this procedure was a convenient one, as tending to avoid an excessive amount of handling of the writing, and, in the case of the enlargements, as obviating, and perhaps being more satisfactory than, the use of a magnifying glass: whether it ought also to be said that some or all of the photographs were reasonably "necessary for the due understanding of the evidence," so as to warrant an allowance of a reasonable sum for the preparation of them, under the Rule of the 24th December, 1913 (Holmested's Judicature Act, p. 1556), is something to be determined upon the taxation. Other photographs were of documents which, apparently, were in the custody of a bank in Detroit, and could not be produced at the trial. If it would have been proper to use the documents, had they been available, it was proper to use the

photographs; and the Taxing Officer ought to have dealt with each of them upon the merits. It does not seem that there was consideration by the Taxing Officer of the photographs, one by one; but rather that there was a ruling that no allowance was warranted for photographs used as these were. This item must be reconsidered.

Item 14: Moneys paid to detectives.

The appeal as to this item was abandoned upon the argument.

Item 15: Fees paid to foreign witnesses, November, 1916, January, 1917, and May, 1917.

For the reasons already given in connection with other items, viz., that there has been no award of the costs reserved by Mr. Justice Middleton's order of November, 1916, the fees of these witnesses, brought to the sittings at which that order was made, cannot be allowed. The defendant is, however, entitled, under Mr. Justice Latchford's order, to the costs thrown away in January, 1917, and, under the judgment, to the costs of the trial held in May, 1917. These costs the Local Registrar taxed, and in taxing them he professed to apply the rule stated in *Ball v. Crompton Corset Co.* (1886), 11 P.R. 256, and to allow whatever had been reasonably and necessarily paid to the witnesses respectively. However, confusion seems to have arisen in applying the rule, attributable in part to the fact that the affidavits of disbursements, instead of shewing how the amount paid to each witness was arrived at, simply gave the residence of each witness, the number of days that he was absent from his place of residence, the number of miles travelled by him, and the amount paid him, and stated that he was subpoenaed at Windsor. I cannot make out, upon the materials before me, how the learned Registrar came to the conclusion that in respect of each witness there ought to be allowed a certain fixed fee for each day of absence from his residence. This item must be reconsidered, and, so that it can be properly considered, the defendant ought to be allowed to file such further affidavits as she may be advised, and it will be open to the officer considering the matter to allow either party to adduce such evidence as the officer may think helpful. Of course the officer will consider, in the case of each witness, whether he ought to have been brought to the trial or whether it would have been more reasonable to examine him upon the commission.

Rose, J.

1919

NEWCOMBE

v.

EVANS.

Rose, J.

1919

NEWCOMBE

v.
EVANS.

The matter will be referred to the Taxing Officer at Toronto to consider and report upon such items as I have said ought to be reconsidered. Further consideration of the appeal, and the question of the costs of the appeal and of the review, will be reserved to be disposed of in Chambers after the Taxing Officer has made his report.

1919

Jan. 7.

[MIDDLETON, J.]

FAULKNER v. FAULKNER.

Will—Testamentary Incapacity—Testator Incapable at Time of Instructions of Remembering Relations with Claims upon his Bounty—Stupor and Mental Inertia—Will Executed three Days after Instructions and one Day before Death—Destruction of Mentality by Disease—Revocation of Probate—Finding of Want of Capacity—Result of.

A will which had been admitted to probate was *held* invalid for lack of testamentary capacity in the testator, and the grant of letters probate was revoked.

The testator was admitted to a hospital on a Tuesday; he was then very ill, and in a state of exhaustion; on the same day his will was drawn, but was not then executed, because, by reason of his physical condition, he was unable to sign it; on the following Friday the will was signed, and on Saturday he died. He was unmarried, had two brothers, and no other relatives who would be entitled to share upon an intestacy. The will was drawn by a solicitor, who received his instructions in the hospital on the Tuesday, and immediately prepared the document, by which \$1 was left to the testator's brother G., the plaintiff, and all the rest of his property to his brother A., the defendant. A will had been drawn for the testator some time before, by which the greater portion of his property was to go to A.'s children, but by it also substantial provision was made for certain female relatives. On the Tuesday, the testator clearly intimated to the solicitor his intention to leave nothing to G. but \$1; and, according to the solicitor's testimony, said that he wanted to give his property to A. and he wanted A.'s family to benefit. Nothing was said about the female relations—the solicitor did not know of their existence or of the earlier document. When the solicitor asked the testator how he wished A. and his family to share, he said, after a little time, "Give it to A." On the Friday there was stupor, and death was very near. The man could not see—a pen was put in his hand and a mark was made:—

Held, that the question was not whether the testator knew that he was giving all to A. and excluding all other relatives, but whether he was, at the time the will was prepared, capable of recollecting who those relatives were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose to exclude them from any share in his property.

Murphy v. Lamphier (1914), 31 O.L.R. 287, 317, 318, followed.

The change from an intention to benefit A.'s family to an absolute gift to A. alone was the result of mental inertia and weakness; and the testator's mind was not active enough to think of any one but G., A., and A.'s children. A will may be executed by one who has very little consciousness left if it is shewn that it was prepared in accordance with his wishes; but in this case all mentality was gone before the mark was made on the Friday.

The finding being that there was no capacity, the Court was not concerned as to the disposition of the testator's property by the operation of law, although the result was to defeat the one adequately expressed idea that G. should take nothing.

ACTION by George Faulkner to set aside probate of a document alleged to be the last will and testament of Hugh Faulkner, deceased, and to have it declared that the alleged will was not operative by reason of lack of testamentary capacity.

1919
FAULKNER
v.
FAULKNER.

The plaintiff and defendant were the brothers and next of kin of the deceased, who was unmarried; he had no other relatives who would be entitled to share upon an intestacy.

By the testamentary document in question the deceased gave his brother George, the plaintiff, \$1, and all the rest of his property to his brother Archibald, the defendant, whom he appointed executor.

December 20, 1918, and January 2 and 3, 1919. The action was tried by MIDDLETON, J., without a jury, in Toronto.

W. N. Tilley, K.C., and H. E. Irwin, K.C., for the plaintiff.

H. H. Dewart, K.C., for the defendant.

January 7. MIDDLETON, J.:—On Tuesday the 29th January, 1918, Faulkner was admitted to the hospital, and on the same day his will was drawn, but was not executed, as, owing to his physical condition, he was unable to sign it; on the following Friday the will was signed, and on Saturday he died.

The will is very simple. Apart from formal provisions, he gives his brother George one dollar, "as I feel he has obtained from me and deprived me of moneys he should not have deprived me of and it is my will that he shall not receive from my estate more than said sum of one dollar." All the rest is given to his brother Archibald absolutely.

At the time Faulkner was admitted to the hospital, he was suffering from a very violent attack of erysipelas, and was then in a condition of great exhaustion. Mr. Anderson, a solicitor who had done business for him, came to the hospital, in pursuance of a request sent by Faulkner before his removal from a boarding-house, for the purpose of preparing a will.

Mr. Anderson knew that Faulkner was an unmarried man, but knew nothing about his family, nor did he know anything about his earlier dispositions of his property.

The mental condition of the testator was then most serious, and was not adequately appreciated by those taking part in what was

Middleton, J.

1919

FAULKNER

v.

FAULKNER.

then done. The toxins developed by the disease were at work and to a very serious degree had destroyed all normal mentality. The testator then had testamentary capacity if sufficiently roused. Dr. Silverthorn, at the close of his testimony, explains the situation in a way that commends itself to me. The man could think if compelled to. If he was left alone, the mind ceased to work. He could have made a valid will if care had been taken to present to his mind for consideration the claims of those relations who would have been the natural objects of his bounty; but, unless he was aided by having these claims brought to his attention, I do not think that he had that capacity which has always been regarded as necessary since *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549.

All that need be said upon the legal aspect of the case was said by Sir John Boyd in *Murphy v. Lamphier* (1914), 31 O.L.R. 287, at p. 317 *et seq.*

Here the testator's mind was so enfeebled by disease that he could comprehend only one idea at a time. He had a fixed and well-rooted antipathy to his brother George—that the cause may have been quite inadequate is not of importance—and his strongest testamentary desire was to exclude him from sharing in his estate.

There is a conflict as to what took place after the wish to exclude George had been expressed. On discovery the defendant gives this narrative: "Mr. Anderson asked, 'What are you going to give Archie?' The deceased said, 'Well, I am going to leave his boys something and the little girl.' Says Mr. Anderson, 'Leave it all to the father, and that will be all right.' He said 'Yes.' And again: 'Whatever you are going to do, leave it to the father. Don't leave it to the boys at all, for they are not of age; leave it to the father, don't make two or three divides of it.'" The defendant now says this is untrue and he heard no such conversation.

Mr. Anderson says: "I asked him how he wanted to dispose of his property, and he said, 'I want to give it to Archie and I want Archie's family to benefit.'" And, after discussing George, "I asked him about Archie's family, and he seemed disconcerted. I said, 'How do you wish your brother and his family to share?' And he said, after a little time, 'Well, give it to Archie.' And I said, 'Will you trust Archie to deal fairly with his family?' And he said 'Yes'."

According to either version, no other possible beneficiary was

mentioned or considered, and I think the change from an intention to benefit Archie's family to an absolute gift to Archie alone was the result of mental inertia and weakness.

Mr. Cameron, of Owen Sound, had drawn a will for the deceased some time before, and in it neither George nor Archie took any benefit. Archie's children received the greater portion, but female relatives received substantial shares and provisions.

Mr. Anderson did not know of these relations, or of the fact that by an earlier will they had benefited. Had Faulkner been so roused that he himself could have thought of them, or had his attention been drawn to them, the result might have been very different.

As put in the case referred to (31 O.L.R. at p. 318), the question for decision is, "not whether the testator knew he was giving all to" his brother Archie "and excluding all other relatives, but whether he was at that time capable of recollecting who those relatives were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose to exclude them from any share in his property." I am satisfied that this man did not think of any one at all save George and Archie and Archie's children. As already indicated, Archie's children were intended to be objects of his bounty, and were excluded not by any conscious act of the testator, but because the question put to him as to how division was to be made between Archie and his children was one calling for greater effort than he was able to accomplish.

I regret that this view of the case results in defeating the one adequately expressed idea that George should take nothing, and that George and Archie must divide, none of the relatives receiving anything; but all the cases shew that I must ascertain if there was capacity, and, if I find there was not, it is no concern of mine what becomes of the property by the operation of law. I venture to suggest to these brothers that it would be greatly to their credit if they settled this litigation by Archie handing over his share to his children and by George handing over his share to the needy relatives whom the brother would have in all probability remembered.

There is another aspect of the case which is of importance. I have so far dealt with the case as if the will had been signed when it was drawn. It was not. Mr. Anderson at once wrote the docu-

Middleton, J.

1919

FAULKNER

v.

FAULKNER.

Middleton, J.

1919

FAULKNER

v.

FAULKNER.

ment, a task of a few minutes only, and attempted to have it signed. So drowsy, weak, and stupid had the man then become that, after three attempts, he could not be got to sign.

From this time on the disease progressed—the toxæmia increased—resulting in death on the Saturday. In the meantime there was fever and no nourishment taken, and clearly by Friday there was stupor, and death was very near. The man could not see, and a pen was put in his hand and a mark was made. Archie, who had been in pretty constant attendance, went home to look after his calves, first telephoning to his brother George, who up to this time was not advised of Hugh's illness, and telling him that Hugh was "speechless and unconscious." When asked if Hugh had his business settled, Archie said, "I do not know," though he had just left the room where the form of executing the will had been gone through.

It is clear that a will may be executed by one who has very little consciousness left if it is shewn that it was prepared in accordance with the wishes of the testator; but here, I think, things had gone too far to justify me in upholding what took place.

At this time, I think, the stupor resulting from the poisons absorbed, and from the nephritis then present, had destroyed all mentality.

The probate of the will must be set aside and the alleged will must be declared void from lack of testamentary capacity.

All costs out of the estate.

[APPELLATE DIVISION.]

1919

Jan. 8.
April 28.

TORONTO GENERAL HOSPITAL TRUSTEES v. SABISTON.

Landlord and Tenant—Ground-lease—Covenant for Renewal—Rent to be Fixed by Arbitration—Award not Made until after Expiry of Original Lease—Refusal of Tenant to Accept New Lease at Rental Fixed by Award—Forfeiture—Claim for Use and Occupation of Land from Expiry of Lease until Election to Refuse New Lease—Liability for Rent Fixed by Award—Reasonable Sum Fixed as Occupation Rent on Basis of Rents Received and Taxes in Arrear, with Abatement—Agreement for Reduced Rent—Effect of.

The title of the lessee in a ground-lease made by the plaintiffs for 21 years from the 1st February, 1892, became vested in the defendant. The lease contained covenants entitling the lessee to a lease for a further term of 21 years, at a rental to be fixed by an award, to be made before the expiration of the term. Arbitrators were appointed, but an award was not made within the time limited, it being agreed that the rights of the parties should not be prejudiced by the delay. When the award was made, on the 30th December, 1916, the rent was increased from \$200, the tenant paying the taxes, to \$1,400, the tenant paying the taxes. The defendant elected to refuse the renewal term. In the meantime he had been in possession by his tenants, and he and his mortgagees had received rents exceeding \$3,000, and taxes to the amount of more than \$2,500 were in arrear. In this action the plaintiffs recovered judgment for possession and forfeiture of the lease. They claimed also the sum of \$6,067 for use and occupation of the lands from the expiration of the original lease until the refusal of the defendant to accept the new lease. A Referee, to whom the action was referred for trial, dismissed this claim:—

Held, on appeal, by MIDDLETON, J., that, as soon as the rental was fixed by the award, the defendant became liable to pay the fixed rental, and ceased to be liable only when the lease was forfeited: *Walsh v. Lonsdale* (1882), 21 Ch. D. 9. He, therefore, allowed the appeal, and gave judgment for the plaintiffs for \$5,000.

This was confirmed upon a further appeal by the defendant to a Divisional Court, where it was *held*, that the defendant was at least liable to the plaintiffs for a reasonable sum for use and occupation; and, assuming that the defendant had proved an agreement with the plaintiffs to the effect that, in consideration of some services, he was to be given the renewal lease at a reduced rent, that could not give him any right in this action. *Rumball v. Wright* (1824), 1 C. & P. 589, and *Winterbottom v. Ingham* (1845), 7 Q.B. 611, distinguished.

AN appeal by the plaintiffs from the report of an Official Referee, to whom the action was referred for trial.

Reasons for the report were given by the Referee as follows (in part):—

The defendant is the successor in title to a ground-lease from the plaintiffs to Mary Medcalfe. The ground lease is dated the 16th October, 1893. The term of the lease is 21 years from the 1st February, 1892, and the lease contains a covenant for renewal for a further term of 21 years at a rent to be fixed by arbitration.

It appeared that the ground-lessee and her successors in title built a number of houses on the Queen street and on the Esplanade

1919

TORONTO
GENERAL
HOSPITAL
TRUSTEES
v.
SABISTON.

frontages, and that the defendant was the owner thereof during and at the expiration of the lease. The land described in the lease and also the houses were very much depreciated in value by the construction of the high level bridge over the Don, and an arbitration was proceeded with to determine the compensation therefor.

The plaintiffs and the defendant entered into an agreement, a short time before the expiration of the term, to postpone proceedings for the renewal of the lease, and the agreement recited that it was advisable, in view of the arbitration between the plaintiffs and defendant and the Corporation of the City of Toronto in reference to the damage caused by the high level bridge, that the rent for the renewal term and all proceedings under the lease should be postponed until after the claim of the plaintiffs and defendant against the city corporation had been disposed of, and the right of the defendant to a renewal of the lease should not be impaired or affected by reason thereof. . . .

The arbitration took place, and an award was made. The defendant refused to sign or accept the renewal lease, and . . . he thereby forfeited the houses and improvements built on the land.

The plaintiffs commenced this action on the 16th April, 1917, for recovery of possession of the land and premises, and for a declaration that the right, title, and interest of the defendant was forfeited. The plaintiffs, pursuant to Rule 127, delivered an amended statement of claim, in which they alleged that the lease had expired, and the defendant refused to accept a renewal, and claimed that the right of renewal was forever barred.

The defendant in his statement of defence disclaimed all estate, right, title, and interest in the lease or the renewal thereof.

The plaintiffs are, therefore, entitled to a judgment declaring that the defendant has forfeited the lease and the houses and improvements and any right to renewal of the lease, and to the costs of the action as far as it relates to this issue.

The plaintiffs also claim to recover the sum of \$6,067 for use and occupation of the premises from the expiration of the original ground-lease until the refusal of the defendant to accept the new lease.

The real issue for trial is whether the plaintiffs have proved a contract by the defendant, express or implied, to pay for such use and occupation.

1919

TORONTO
GENERAL
HOSPITAL
TRUSTEES
v.
SABISTON.

The defendant denies any obligation to pay for the use and occupation during the said interval.

The evidence established that the defendant was in possession of the property and collected a small amount for rent. He also claimed a sum for services rendered to the plaintiffs in connection with their arbitration with the city corporation.

On the argument, counsel for the defendant said that he would waive any taking of accounts between the plaintiffs and defendant, and would make no claim against the plaintiffs for services, if the plaintiffs failed to prove an express or implied contract for the use and occupation during the course of the arbitration.

On the evidence, I must find that there was no express or implied contract, and I am of the opinion, and I find, that the relation of landlord and tenant ceased between the plaintiffs and the defendant at the expiration of the term of the original ground-lease, and that the relation was not continued after that date. A renewal of the lease for a further term of 21 years was in contemplation between the plaintiffs and the defendant during the course of the arbitration, and I find that the defendant acted in good faith throughout the arbitration, and he refused to accept the renewal lease under the award of the arbitrators.

After giving the matter my best consideration, I am of the opinion and find that the plaintiffs are not entitled to recover for the alleged use and occupation of the premises during the said interval, and that the action for use and occupation under an implied contract fails. See *Rumball v. Wright* (1824), 1 C. & P. 589; *Winterbottom v. Ingham* (1845), 7 Q.B. 611.

I therefore find in favour of the defendant on the issue of payment for use and occupation, and the defendant is entitled to the costs of this issue.

December 23, 1918. The appeal from the Referee's report was heard by MIDDLETON, J., in the Weekly Court, Toronto.

H. D. Gamble, K.C., for the plaintiffs.

William Laidlaw, K.C., for the defendant.

January 8, 1919. MIDDLETON, J.:—Appeal from the report of an Official Referee, to whom the action was referred for trial, finding that the plaintiffs were not entitled to recover anything for rental

Middleton, J.

1919

TORONTO
GENERAL
HOSPITAL
TRUSTEES
v.
SABISTON.

or for use and occupation of the lands in question from the 1st February, 1913, when the term granted by the original lease expired, and the 7th May, 1917, when the plaintiffs recovered possession under a judgment of this Court.

The lands in question were demised for 21 years from the 1st February, 1892, by a lease of the 16th October, 1893. The title of the lessee became vested in the defendant.

The lease contained covenants entitling the lessee to a new and further lease for a further term of 21 years, at a rental to be fixed by the award of three arbitrators, to be made before the expiration of the term.

Arbitrators were duly appointed, but an award was not made within the time limited, as proceedings against the Corporation of the City of Toronto to recover damages for injury caused to the lands by the high level bridge across the Don were pending, and it was agreed by a formal document that the arbitration should stand till these proceedings should be ended, and the rights of the parties should not be prejudiced by this delay.

When the award was made, on the 30th December, 1916, the rental was increased from \$200 per annum to \$1,400 per annum—the tenant in each case paying the taxes.

Sabiston thought this award excessive, and refused to pay. Hence this action.

In the meantime the property had been in possession of sub-tenants, and a statement has now been put in shewing that the defendant has received \$2,248 rental, and his mortgagee, the Toronto General Trusts Corporation, has collected \$1,601.16, a total of \$3,849.16, and taxes have been allowed to fall into arrear to the amount of \$2,658.51.

The Referee has dismissed with costs the claim of the plaintiffs, holding that they have no claim of any kind against the defendant, and that he may retain for his own use all that he has received.

Mr. Laidlaw does not admit the accuracy of these figures, and desires time to look into them, and I should readily grant this if I regarded them as being material.

When there was an agreement for a lease at a rental to be fixed by arbitration, in my view as soon as the rental was fixed the defendant became liable to pay the fixed rental, and only ceased to be liable when the lease was forfeited: *Walsh v. Lonsdale* (1882), 21 Ch. D. 9.

Middleton, J.

1919

TORONTO
GENERAL
HOSPITAL
TRUSTEES

v.

SABISTON.

Mr. Gamble recognised the fact that the rental was fixed for the whole 21 years, probably having in view that the property might increase in value during the term, and assented to any abatement from the plaintiffs' strict right I might regard as fair.

Having this in mind, I give the plaintiffs judgment for \$5,000, a sum considerably less than the rental and unpaid taxes—this sum to be taken to cover the costs of the action and appeal.

The defendant appealed from the judgment of MIDDLETON, J.

April 28. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and LATCHFORD, JJ.

H. H. Dewart, K.C., for the appellant, contended that there was no liability, relying upon the two cases cited by the Referee.

Gamble, K.C., for the plaintiffs, respondents, was not called upon.

At the conclusion of the argument for the appellant, the judgment of the Court was delivered by MEREDITH, C.J.C.P.:—The defendant was tenant of the plaintiffs under a renewable lease, renewable at the option of the tenant, at a rent to be fixed by arbitration. The arbitration was had and the rent so fixed at \$1,400 a year and taxes.

The defendant elected to refuse the renewal term; but had been in possession for over 4 years before the award was made and the election declared by him, and he and his mortgagees had received rents of the property in the meantime, nearly \$4,000, and taxes to the amount of more than \$2,500 were in arrear.

Middleton, J., awarded the plaintiffs \$5,000.

From whichever point of view this case is looked upon, the plaintiffs are entitled to judgment against the defendant for, at the least, the sum which has been awarded them. The defendant, having been in possession, and in receipt of the rents and profits, of the land whilst the arbitration proceedings and his election were pending, is, at the least, liable to the plaintiffs for a reasonable sum for such use and occupation. If really he had no right to reject the new term at the time when he did so, and after all that had happened up to that time, he should pay the rent fixed by the award, \$1,400, and taxes; but, if his rejection of it was right—and

App. Div.
1919

TORONTO
GENERAL
HOSPITAL
TRUSTEES

v.

SABISTON.

Meredith,
C.J.C.P.

the plaintiffs seem to have acquiesced in it—then he should pay a reasonable sum, if not the full rent; and, according to some of the witnesses, that sum should be much more than the amount fixed by the arbitrators: one of the witnesses testified that it should be \$2,400 a year and taxes. So that either way the amount of the judgment appealed against is less, rather than more, than it should have been. The cases referred to by the Referee were cases in which the plaintiff was not the owner of the land and failed because of that: they have no application to a case such as this.

But Mr. Dewart relied mainly upon the testimony of the defendant that, in consideration of some services rendered by him to the plaintiffs in connection with a claim they had against the Corporation of the City of Toronto, he was to be given the renewal lease at a reduced rent. Assuming that to be proved, how can it give any right to him in this action? It was to have been a reduction of the rental for the term which he has rejected; and, if such a bargain were ever made, the arbitration was unnecessary, the parties had agreed upon the rental; and, if an arbitration were had notwithstanding such an agreement, the agreement should have been proved, and given effect, in the arbitration proceedings: but was not, nor was it in an appeal to this Court against the arbitrator's rulings (see *Re Toronto General Hospital Trustees and Sabiston* (1917), 38 O.L.R. 139, 33 D.L.R. 78). It is altogether too late, in any case, to raise it now for the first time with any hope of credit being given to the story, in the face of the explicit denial of it by the plaintiffs' agent with whom it is said to have been made, a denial testified to in the proceedings in the Referee's office.

The appeal must be dismissed.

[IN CHAMBERS]

1919

COPELAND V. MERTON.

Jan. 9.

Mortgage—Order of Local Judge Authorising Commencement of Action for Foreclosure and on Covenant—Mortgagors and Purchasers Relief Act, 1915, secs. 2 (2), 5 (2)—Notice of Application for Order not Given to Mortgagor Liable on Covenant—Service of Notice Dispensed with—Order Improperly Made ex Parte—Power of Judge in Chambers to Rescind—Rules 217, 505 (1)—Action Commenced Pursuant to Order—Writ of Summons Set aside.

A mortgage made to the plaintiff by the defendant M., dated the 1st November, 1913, being in arrear, the plaintiff on the 24th December, 1918, obtained leave from a Local Judge to make a motion before him, returnable on the 27th December, for an order for leave to commence an action for foreclosure. A notice of the motion was sent by registered post to a solicitor who had on behalf of M. been corresponding with the plaintiff's solicitor; the solicitor received the notice on the 26th December, but he was not authorised to accept nor did he accept service for M. On the 27th December, the Local Judge made an order permitting the plaintiff to commence an action for foreclosure and for judgment against M. on his covenant and for possession. The order provided that service of notice of the application on M. be dispensed with. Under the Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22, an order authorising the commencement of an action on the mortgage was necessary:—

Held, that the order was an *ex parte* one, and improperly made without notice to M.: secs. 2 (2) and 5 (2) of the Act.

Held, also, that a Judge in Chambers had power, under Rule 505 (1) or Rule 217, to rescind the order.

Re George and Lang (1916), 36 O.L.R. 382, distinguished.

The order was rescinded and the writ of summons issued pursuant thereto set aside.

MOTION by the defendant Merton to rescind an order made by the Local Judge at Cobourg, dated the 27th December, 1918, permitting the plaintiff to commence an action to enforce by foreclosure a certain mortgage, and for an order dismissing the action commenced by the plaintiff on the same day.

January 7. The motion was heard by CLUTE, J., in Chambers.

H. R. Moses, for the applicant.

D. B. Simpson, K.C., for the plaintiff.

January 9. CLUTE, J.:—After some correspondence, the defendant Merton, the original mortgagor, who was liable on the covenant, wrote (by his solicitor) to the plaintiff's solicitor on the 10th December, 1918, asking him to prepare an assignment of the mortgage to the defendant Merton and submit the same for approval.

The plaintiff's solicitor prepared the assignment and sent it forward on the 14th December, stating the amount due with interest. This letter was received on the 17th December by the defendant's solicitor, who held the same awaiting the receipt of funds from the sale of Victory bonds, intending, upon receipt of

Clute, J.

1919

COPELAND

v.
MERTON.

the money, to forward the same together with the assignment to the plaintiff's solicitor.

There was a little delay in the sale of the bonds and the receipt of the money, and on the 23rd December the plaintiff obtained leave from the Local Judge at Cobourg to make a motion before him, returnable on Friday the 27th December, for an order for leave to commence an action for foreclosure upon the mortgage in question, bearing date the 1st November, 1913, and made between the defendant Merton as mortgagor and the plaintiff, Mary Copeland, as mortgagee.

The notice of motion was sent with a registered letter to the defendant's solicitor, who received the same on the 26th December.

On the 27th December, the Local Judge made an order permitting the plaintiff to commence, by the issue of a writ of summons, an action to enforce the said mortgage by foreclosure and for judgment against the defendant Merton on his covenant for the amount due thereon with interest and for possession of the lands in question. The order further provides that service of the notice of the application for the order upon the defendant Merton be dispensed with.

The defendant Merton was not served with the notice, and his solicitor was not authorised to accept service, nor did he accept service, for the defendant.

An application under the Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22, may be made to the Local Judge of the Supreme Court sitting in Chambers, or to a Judge of the Supreme Court sitting in Chambers (sec. 2 (1) (a)).

It was not disputed that this was a case in which an order of the Court was required authorising the issue of the writ.

Section 5, sub-sec. 2, provides that the Judge may give directions as to the service of notice of the hearing of the application upon any person whom he deems a proper party to the proceedings, or he may dispense with service of the notice of the application upon any party who appears to have abandoned his interest in the property if the Judge considers that the service of the notice would occasion useless or unnecessary expense or delay.

Here there was no question of abandonment, and no doubt, in my opinion, that the defendant Merton was entitled to notice under the usual practice of the Court before an order could be made for payment against him.

The application for leave to take proceedings under the Act is to be upon originating notice in accordance with the practice of the Supreme Court: sec. 2, sub-sec. 2.

Rule 505 (1) gives an appeal from the order of a Local Judge to a Judge in Chambers. I think that Rule applies in the present case: it was a question of practice; the defendant had not been served: the order was made *ex parte*.

Rule 217 provides for a motion to rescind in a case of this kind, and the application may be made either before the Judge or officer who made the *ex parte* order, or any Judge having jurisdiction, within four days from the time when the order comes to his notice.

The plaintiff relied upon the case of *Re George and Lang* (1916), 36 O.L.R. 382, 30 D.L.R. 504, and objected to my jurisdiction in the case. In that case the motion was for leave to appeal from an order of the Chief Justice of the Exchequer dismissing a motion under the Mortgagees and Purchasers Relief Act for leave to proceed upon a mortgage. Leave in that case was refused by Middleton, J., who held that, upon the application for leave, the Judge is given certain powers to be exercised "in his absolute discretion," and "subject to such conditions as he thinks fit." The discretion here referred to is contained in sec. 5 (1): "The Judge may, in his absolute discretion, after considering all the circumstances of the case and the position of all the parties, by order refuse to permit the exercise of any right or remedy, or may stay execution or postpone any forfeiture or extend the time for the expenditure of any money or the making or providing any such improvements or services, as the case may be, for such time and subject to such conditions as he thinks fit."

This discretion has relation to the merits of the application, and does not, in my opinion, touch the present case, where the defendant received no notice.

I do not think that the Local Judge was authorised to dispense with the service of the notice upon the defendant Merton, who is being sued upon his covenant.

In my opinion, the order should be rescinded, and the writ issued by virtue of its authority set aside. The defendant Merton is entitled to the costs of this motion.

Clute, J.

1919

COPELAND

v.

MERTON.

END OF VOL. 44.

APPENDIX I.

RULES PASSED 25TH APRIL, 1919.

TEMPORARY RULE No. 1:—

That from the passing of the Rule until the end of October, 1919, office hours shall be from 9 a.m. to 3 p.m., and on Saturdays from 9 a.m. to 12 noon, save during vacation, when the office hours shall be from 9 a.m. to 11 a.m. This Rule shall apply only to the offices in Toronto, Ottawa, and Hamilton to which the provisions of the Judicature Act and County Courts Act apply, and to the offices of the Sheriffs of York, Toronto, Carleton, and Wentworth.

RULE 775:—

When a stenographer is employed upon a reference the fee payable shall be as follows:

(1) For services at the hearing each day on which actually employed.....\$8.00

(2) For copies of evidence required for use upon the reference or on an appeal. Ten cents per folio of one copy for all copies required of any one transcription of shorthand notes not exceeding six copies altogether.

(3) For any additional copies required: five cents per folio of each copy.

(4) For single copies ordered, seven and a half cents per folio.

(5) For reading evidence to the Master from notes when no copies are ordered at the rate of \$1.50 per hour, payable by the party having the conduct of the reference.

Items 1 and 5 shall not be payable to stenographers employed at Osgoode Hall paid by salary.

RULE 773 (g) 1:—

The tariff of fees payable County Court Clerks, item No. 3, is amended by adding after the words "jury case," the words "including the fee payable under the Jurors' Act;" and tariff B

(page 208 of the Consolidated Rules), is amended by substituting for the words "including jury fee," the words "including the fee payable under the Jurors' Act."

RULE 773 (g) 2:—

Rule 326 (1) is amended by adding the words "or the defendant may, if he so elects, discontinue his counterclaim in whole or in part, and the defendant by counterclaim shall then be entitled to the costs of the counterclaim if wholly discontinued, or if not wholly discontinued to the costs occasioned by the part withdrawn, and the provisions of Rule 321 (2), (3), and (4) shall, *mutatis mutandis*, apply thereto."

These Rules shall come into force forthwith.

RULE PASSED 14TH MAY, 1919.

TEMPORARY RULE No. 2:—

The provisions of Temporary Rule No. 1 shall apply, in addition to the cities and counties therein named, to any city, town, village, or county to which it may be declared to be applicable by the Chief Justice of Ontario.

This Rule shall come into force forthwith.

APPENDIX II.

Ontario cases decided on appeal to the Supreme Court of Canada* and reported since the publication of vol. 43 of the Ontario Law Reports:—

BURKETT v. OTT, 41 O.L.R. 578, reversed by the Supreme Court of Canada: BURKETT v. OTT, 57 Can. S.C.R. 608.

CYCLONE WOVEN WIRE FENCE CO. v. TOWN OF COBOURG, 13 O.W.N. 236, affirmed by the Supreme Court of Canada: TOWN OF COBOURG v. CYCLONE WOVEN WIRE FENCE CO., 57 Can. S.C.R. 289.

DINGLE v. WORLD NEWSPAPER Co., 43 O.L.R. 218, reversed by the Supreme Court of Canada: DINGLE v. WORLD NEWSPAPER Co. OF TORONTO, 57 Can. S.C.R. 573.

FRANCIS v. ALLAN, 43 O.L.R. 479, reversed by the Supreme Court of Canada: FRANCIS v. ALLAN, 57 Can. S.C.R. 373.

LONDON ELECTRIC Co. v. ECKERT, 40 O.L.R. 208, affirmed by the Supreme Court of Canada: ECKERT v. LONDON ELECTRIC R.W. Co., 57 Can. S.C.R. 610.

NORTH-WESTERN NATIONAL BANK OF PORTLAND v. FERGUSON, 12 O.W.N. 15, reversed by the Supreme Court of Canada: NORTH-WESTERN NATIONAL BANK OF PORTLAND v. FERGUSON, 57 Can. S.C.R. 420.

OGILVIE FLOUR MILLS Co. LIM TED v. MORROW CEREAL Co., 41 O.L.R. 58, n part reversed by the Supreme Court of Canada: MORROW CEREAL Co. v. OGILVIE FLOUR MILLS Co., 57 Can. S.C.R. 403.

ORR, RE, 40 O.L.R. 567, reversed by the Supreme Court of Canada: CAMERON v. CHURCH OF CHRIST SCIENTIST, 57 Can. S.C.R. 298.

PORT ARTHUR WAGGON Co. LIMITED, RE, SMYTH'S CASE, 9 O.W.N. 383, 12 O.W.N. 59, reversed by the Supreme Court of Canada: RE PORT ARTHUR WAGGON Co., SMYTH'S CASE, 57 Can. S.C.R. 388.

SPINK, RE, 41 O.L.R. 281, reversed by the Supreme Court of Canada: BRODIE v. CHIPMAN, 57 Can. S.C.R. 321.

*No Ontario cases decided on appeal to the Judicial Committee of the Privy Council have been reported since the publication of vol. 43 of the Ontario Law Reports.

INDEX.

ABATEMENT.

See NUISANCE.

ACCOMPLICES.

See ONTARIO TEMPERANCE ACT, 2.

ACCOUNT.

See GUARANTY, 1.

AFFIDAVITS

See ALIEN ENEMY—CRIMINAL LAW, 2—NUISANCE.

AGENT.

See HUSBAND AND WIFE — SALE OF GOODS.

AGREEMENT.

See CONTRACT.

ALIEN ENEMY.

Magistrate's Conviction for Neglecting to Register—Dominion Order in Council of 20th September, 1916—Permanent Place of Residence—No Evidence to Support Conviction—Attempt to Support under Subsequent Orders in Council—Failure upon Evidence—Order Quashing Conviction—Improper Conduct of Magistrate and Prosecutor—Order for Costs—Refusal of Protection against Action—Affidavits—Re-opening Motion to Quash after Order Pronounced but before Entry—Duties of Magistrates.

REX V. HACKAM, 224.

ALLOTMENT.

See COMPANY, 1.

ALTERATION OF WILL.

See WILL.

AMENDMENT.

See CONTRACT, 2—HUSBAND AND WIFE—MUNICIPAL CORPORATIONS, 1—ONTARIO TEMPERANCE ACT, 1.

APPEAL.

See BROKERS—CONTRACT, 3—COSTS, 1, 2 — HUSBAND AND WIFE—INSURANCE, 2—MUNICIPAL CORPORATIONS, 1, 4—ONTARIO TEMPERANCE ACT, 2—STREET RAILWAY, 4—WILL, 1.

APPEARANCE.

See WRIT OF SUMMONS.

APPROPRIATION OF GOODS TO CONTRACT.

See SALE OF GOODS.

APPROPRIATION OF PAYMENTS.

See GUARANTY, 1.

APPROVAL.

See MUNICIPAL CORPORATIONS, 6.

ARBITRATION AND AWARD.

See LANDLORD AND TENANT.

ASHBURTON TREATY.

See WATER.

ASSAULT.

See CONSPIRACY.

ASSESSMENT OF COST OF WORKS.

See MUNICIPAL CORPORATIONS, 2, 4.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See GUARANTY, 1.

ASSIGNMENT OF JUDGMENT.

See COMPANY, 3.

ASSIGNMENT OF MORTGAGE.

See MORTGAGE, 2.

ASSIGNMENT OF POLICY.

See INSURANCE, 1.

ASSIGNMENT OF PROPERTY INSURED.

See INSURANCE, 1.

AUTOMOBILES.

See HIGHWAY—NEGLIGENCE, 1.

AWARD.

See LANDLORD AND TENANT.

BANKRUPTCY AND INSOLVENCY.

See COMPANY, 3—FRAUDULENT CONVEYANCE—GUARANTY, 1.

BANKS AND BANKING.

See COMPANY, 2—GUARANTY, 1, 2.

BARTER OF CHEQUE.

See BILLS OF EXCHANGE.

BENEVOLENT SOCIETY.

See CONSPIRACY.

BIGAMY.

See CRIMINAL LAW, 1.

BILLS OF COSTS.

See SOLICITOR.

BILLS OF EXCHANGE.

Effect of Acceptance by Seller from Buyer of Cheque of Third Person in Exchange for Goods—Barter of Cheque with all Risks—Dishonour of Cheque—Absence of Laches—Non-revival of Debt—Failure of Action against Buyer for Price of Goods.

McGLYNN v. HASTIE, 190.

See HUSBAND AND WIFE.

BISHOP.

See CEMETERY—CONSPIRACY.

BOARD OF HEALTH.

See CEMETERY—NUISANCE.

BOARD OF RAILWAY COMMISSIONERS.

See NEGLIGENCE, 2.

BOND.

See GUARANTY.

BONDS AND BOND-HOLDERS.

See RAILWAY.

BORROWING STOCK.

See BROKERS.

BRIDGE.

See MUNICIPAL CORPORATIONS, 1—NEGLIGENCE, 2.

BRITISH NORTH AMERICA ACT.

See CONSTITUTIONAL LAW—STREET RAILWAY, 4.

BROKERS.

Transactions in Company-shares — “Borrowing Stock” —

BROKERS—(Continued.)

Payment Made by Borrower, whether for "Marking up" or "Closing out" Transaction—Evidence—Finding of Fact of Trial Judge—Reversal on Appeal.
JARVIS v. CONNELL, 264.

BY-LAWS.

See **MUNICIPAL CORPORATIONS**
 — **RAILWAY**, 2 — **TELEPHONE COMPANY**.

CALLS.

See **WRIT OF SUMMONS**.

CASES.

Anglo-French Co-operative Society, In re, Ex p. Pelly (1882), 21 Ch.D. 492, followed. *Re BAILEY COBALT MINES LIMITED, BAILEY COBALT MINES LIMITED v. BENSON*, 1.

Ashby v. Harris (1868), L.R. 3 C.P. 523, followed. **HUBBS v. BLACK**, 545.

Baines v. Curley (1916), 38 O.L.R. 301, distinguished. **JOHNSON & CAREY Co. v. CANADIAN NORTHERN R.W. Co.** 533.

Ball v. Crompton Corset Co. (1886), 11 P.R. 256, referred to. **NEWCOMBE v. EVANS**, 628.

Barry v. Anderson (1891), 18 A.R. 247, followed. **HOEHN v. MARSHALL**, 241.

Beal v. Michigan Central R.R. Co. (1909), 19 O.L.R. 502, followed. **JARVIS v. CONNELL**, 264.

Bickford v. Town of Chatham (1889), 16 Can. S.C.R. 235, followed. **MATHESON v. TOWN OF MITCHELL**, 619.

Bonanza Creek Gold Mining Co. Limited v. The King, [1916]

CASES—(Continued.)

1 A.C. 566, 584, 585, referred to. **BASIL v. SPRATT**, 155.

Blake v. Hummell (1884), 51 L.T.R. 43, applied. **LYNCH-STAUNTON v. SOMERVILLE**, 575.

Boulton and Town of Peterborough, Re (1859), 16 U.C.R. 380, 386, 387, followed. *Re BUTTERWORTH AND CITY OF OTTAWA*, 84.

Brawley v. United States (1877), 96 U.S. 168, followed. **SUSMAN v. BAKER**, 39.

Breeze v. Midland R.W. Co. (1879), 26 Gr. 225, distinguished. **JOHNSON & CAREY Co. v. CANADIAN NORTHERN R.W. Co.**, 533.

Bryan v. Whistler (1828), 8 B & C. 288, distinguished. **HUBBS v. BLACK**, 545.

Bryant v. Herbert (1878), 3 C.P.D. 389, followed. *Re GLASS v. GLASS*, 236.

Camidge v. Allenby (1827), 6 B. & C. 373, followed. **McGLYNN v. HASTIE**, 190.

Carr v. Corfield (1890), 20 O.R. 218, followed. **BANK OF MONTREAL v. STAIR**, 79.

Carter v. Canadian Northern R.W. Co. (1911), 24 O.L.R. 370, distinguished. **MOLSONS BANK v. CRANSTON**, 58.

Cartwright v. Town of Napanee (1905), 11 O.L.R. 69, 72, followed. *Re BUTTERWORTH AND CITY OF OTTAWA*, 84.

Chatfield v. Cunningham (1892), 23 O.R. 153, approved and followed. **HOEHN v. MARSHALL**, 241.

Chishom v. Provincial Insurance Co. (1869), 20 U.C.C.P. 11,

CASES—(Continued.)

approved and followed. *STAD-
DON V. LIVERPOOL-MANITOBA
ASSURANCE Co.*, 355.

Collyer v. Isaacs (1881), 19
Ch. D. 342, 351, followed.
*TRUSTS AND GUARANTEE Co.
LIMITED V. GRAND VALLEY R.W.
Co.*, 398.

Crain v. Wade (1917), 55 Can.
S.C.R. 208, followed. *Re
BAILEY COBALT MINES LIMITED,
BAILEY COBALT MINES LIMITED
V. BENSON*, 1.

Crawford v. Tilden (1907), 14
O.L.R. 572, followed. *JOHNSON
& CAREY Co. V. CANADIAN
NORTHERN R.W. Co.*, 533.

Dalton v. Angus (1881), 6
App. Cas. 740, followed. *Re
WATERLOO LOCAL BOARD OF
HEALTH, CAMPBELL'S CASE*, 338.

Damon v. Damon (1864), 8
Allen (Mass.) 192, followed.
GRANT V. GRANT, 143.

Davis and City of Toronto, Re
(1891), 21 O.R. 243, referred to.
SNOW V. CITY OF TORONTO, 623.

Dempster v. Lewis (1903), 33
Can. S.C.R. 292, followed. *JAR-
VIS V. CONNELL*, 264.

*Dimes v. Grand Junction Canal
Co.* (1852), 17 Jur. 73, dis-
tinguished. *Re Toronto R.W.
Co. and City of Toronto*, 381.

Drhew v Altoona City (1888),
121 Penn. St. 401, 421, approved.
*MILLS V. CONTINENTAL BAG AND
PAPER Co.*, 71.

Eagleton's Case (1855), 1
Dears. 515, 538, applied. *STONE
V. WORLD NEWSPAPER Co. LIM-
ITED*, 33.

*Eastern Construction Co. Limited
v. National Trust Co. Limited*,

CASES—(Continued.)

[1914] A.C. 197, followed. *Mc-
CALLUM V. COHOE*, 497.

Edwards v. Blackmore (1918),
42 O.L.R. 105, referred to.
BASIL V. SPRATT, 155.

Edwards v. Mallan, [1908] 1
K.B. 1002, followed. *Re GLASS
V. GLASS*, 236.

Entner v. Benneweis (1894), 24
O.R. 407, distinguished. *STONER
V. SKENE*, 609.

Erwing v. Dominion Bank
(1904), 35 Can. S.C.R. 133,
distinguished. *MOLSONS BANK
V. CRANSTON*, 58.

Fydel v. Clark (1796), 1 Esp.
447, followed. *McGLYNN V.
HASTIE*, 190.

Gaulin and City of Ottawa, Re
(1914), 6 O.W.N. 30, 16 D.L.R.
865, followed. *BURLINGTON
PUBLIC SCHOOL BOARD V. TOWN
OF BURLINGTON*, 561.

Gaulin v. City of Ottawa (1914),
6 O.W.N. 38, followed. *BUR-
LINGTON PUBLIC SCHOOL BOARD
V. TOWN OF BURLINGTON*, 561.

George and Lang, Re (1916),
36 O.L.R. 382, distinguished.
COPELAND V. MERTON, 645.

Gibbons v. Tomlinson (1891),
21 O.R. 489, 497, referred to.
BANK OF MONTREAL V. STAIR, 79.

Gibson v. West Luther (1911),
20 O.W.R. 405, commented on.
*Re LABUTE AND TOWNSHIP OF
TILBURY NORTH*, 522.

*Gillespie and City of Toronto,
In re* (1892), 19 A.R. 713,
followed. *FLEMING V. TOWN OF
SANDWICH*, 514.

Gorris v. Scott (1874), L.R. 9
Ex. 125, applied. *SMITH V. ONT-
ARIO AND MINNESOTA POWER
Co. LIMITED*, 43.—Followed.

CASES—(Continued.)

WALSH v. INTERNATIONAL
BRIDGE AND TERMINAL Co., 117.

Gould v. Ferguson (1913), 29
O.L.R. 161, distinguished.

LYNCH-STAUNTON v. SOMER-
VILLE, 575.

*Grainger v. Order of Canadian
Home Circles* (1914-15), 31 O.L.
R. 461, 33 O.L.R. 116, referred
to. GRAINGER v. ORDER OF
CANADIAN HOME CIRCLES, 53.

Grant Bulcraig & Co., In re,
[1906] 1 Ch. 124, 128, followed.
Re SOLICITORS, 273.

*Greenock Corporation v. Cale-
donian R.W. Co.*, [1917] A.C.
556, followed. SMITH v. ONT-
ARIO AND MINNESOTA POWER
Co. LIMITED, 43.

Hay, In re, Kerr v. Stinnear,
[1904] 1 Ch. 317, distinguished.
GRANT v. GRANT, 143.

Hodgins and City of Toronto,
Re (1909), 10 O.W.N. 31, ap-
proved. FLEMING v. TOWN OF
SANDWICH, 514.

Hoffman v. McCloy (1917),
38 O.L.R. 446, distinguished.
GRAINGER v. ORDER OF CAN-
ADIAN HOME CIRCLES, 53.

Holroyd v. Marshall (1862),
10 H.L.C. 191, 211, followed.
TRUSTS AND GUARANTEE Co.
LIMITED v. GRAND VALLEY R.W.
Co., 398.

Hovey v. Whiting (1887), 14
Can. S.C.R. 515, 531, 532, fol-
lowed. BANK OF OTTAWA v.
HAMILTON STOVE AND HEATER
Co., 93.

*Hurst v. Picture Theatres Lim-
ited*, [1915] 1 K.B. 1, followed.
HUBBS v. BLACK, 545.

*Huson and Township of South
Norwich, In re* (1892), 19 A.R.

CASES—(Continued.)

343, 350, 351, followed. *Re*
BUTTERWORTH AND CITY OF
OTTAWA, 84.

*Hutchinson v. Standard Bank
of Canada* (1917), 39 O.L.R. 286,
followed. MCCALLUM v. COHOE,
497.

Johnson, Ex p. (1875), 6 P.R.
225, considered. *Re SPELLMAN
AND LITOVITZ*, 30.

*Johnson & Carey Co. v. Can-
adian Northern R.W. Co.* (1918),
43 O.L.R. 10, affirmed on one
branch and reversed on another.
JOHNSON & CAREY Co. v. CAN-
ADIAN NORTHERN R.W. Co., 533.

*Johnston and Township of Til-
bury East, Re* (1911), 25 O.L.R.
242, distinguished. *Re LABUTE
AND TOWNSHIP OF TILBURY
NORTH*, 522.

Johnston (R.L.), Re (1901),
3 O.L.R. 1, approved. LYNCH-
STAUNTON v. SOMERVILLE, 575.

*Keighley Maxsted & Co. v.
Durant*, [1901] A.C. 240, fol-
lowed. MCCALLUM v. COHOE,
497.

Kemp and City of Toronto, Re
(1915), 21 D.L.R. 833, 835,
approved. FLEMING v. TOWN
OF SANDWICH, 514.

Kendler v. Bernstock (1915),
33 O.L.R. 351, distinguished.
JOHNSON & CAREY Co. v. CAN-
ADIAN NORTHERN R.W. Co., 533.

Latch v. Furlong (1866), 12
Gr. 303, distinguished. HOEHN
v. MARSHALL, 241.

*Livingstone v. Western Insur-
ance Co.* (1869), 16 Gr. 9, ap-
proved and followed. STADDON
v. LIVERPOOL-MANITOBA ASSUR-
ANCE Co., 355.

CASES—(Continued.)

Lockie v. Township of North Monaghan (1917), 12 O.W.N. 171, followed. *HALL MOTORS LIMITED v. F. ROGERS & Co.*, 327.

London Association for Protection of Trade v. Greenlands Limited, [1916] 2 A.C. 15, dictum in, at pp. 32, 33, dissented from. *BASIL v. SPRATT*, 155.

London Freehold and Leasehold Property Co. v. Baron Suffield, [1897] 2 Ch. 608, followed. *MOLSONS BANK v. CRANSTON*, 58.

Lumsden v. Spectator Printing Co. (1913), 29 O.L.R. 293, distinguished. *WILSON v. LONDON FREE PRESS PRINTING Co.*, 12.

Lynch-Staunton v. Somerville (1918), 43 O.L.R. 282, reversed. *LYNCH-STAUTON v. SOMERVILLE*, 575.

McCallum v. Cohoe (1918), 42 O.L.R. 595, reversed. *McCALLUM v. COHOE*, 497.

Mackay v. City of Toronto (1918), 43 O.L.R. 17, explained and distinguished. *WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS*, 584.

Mackenzie v. Maple Mountain Mining Co. (1910), 20 O.L.R. 615, 618, followed. *Re BUTTERWORTH AND CITY OF OTTAWA*, 84.

McKenzie v. Montreal and Ottawa R.W. Co. (1878), 29 U.C.C.P. 333, approved. *TRUSTS AND GUARANTEE Co. LIMITED v. GRAND VALLEY R.W. Co.*, 398.

McLean v. Wokes (1914), 7 O.W.N. 490, followed. *BASIL v. SPRATT*, 155.

McQueen v. Phœnix Mutual

CASES—(Continued.)

Fire Insurance Co. (1880), 4 Can. S.C.R. 660, distinguished. *STADDON v. LIVERPOOL-MANITOBA ASSURANCE Co.*, 355.

Marsh v. Joseph, [1897] 1 Ch. 213, followed. *McCALLUM v. COHOE*, 497.

Mercantile Investment and General Trust Co. v. River Plate Trust Loan and Agency Co., [1894] 1 Ch. 578, 593, referred to. *Re BAILEY COBALT MINES LIMITED*, *BAILEY COBALT MINES LIMITED v. BENSON*, 1.

Merchants Life Association, Re (1901), 2 O.L.R. 682, followed. *GRAINGER v. ORDER OF CANADIAN HOME CIRCLES*, 53.

Metropolitan R.W. Co. v. Fowler, [1892] 1 Q.B. 165, referred to. *SNOW v. CITY OF TORONTO*, 623.

Milan Tramways Co., In re, Ex p. Theys (1882-4), 22 Ch.D. 122, 25 Ch.D. 587, followed. *Re BAILEY COBALT MINES LIMITED*, *BAILEY COBALT MINES LIMITED v. BENSON*, 1.

Moreland v. Richardson (1856-7), 22 Beav. 596, 24 Beav. 33, followed. *HUBBS v. BLACK*, 545.

Murphy v. Lamphier (1914), 31 O.L.R. 287, 317, 318, followed. *FAULKNER v. FAULKNER*, 634.

National Live Stock Insurance Co. Limited, In re, [1917] 1 Ch. 628, followed. *Re BAILEY COBALT MINES LIMITED*, *BAILEY COBALT MINES LIMITED v. BENSON*, 1.

Nitro-Phosphate and Odam's Chemical Manure Co. v. London and St. Katharine Docks Co. (1878), 9 Ch.D. 503, followed. *SMITH v. ONTARIO AND MINNESOTA POWER Co. LIMITED*, 43.

CASES—(Continued.)

Ontario and West Shore R.W. Co., Re (1911), 2 O.W.N. 1041, considered. *STOTHERS v. TORONTO GENERAL TRUSTS CORPORATION*, 432.

Ottawa Wine Vaults Co. v. McGuire (1912), 27 O.L.R. 319, 324, followed. *BANK OF MONTREAL v. STAIR*, 79.

Peterson Lake Silver Cobalt Mining Co. Limited v. Dominion Reduction Co. Limited (1917), 41 O.L.R. 182, affirmed. *PETERSON LAKE SILVER COBALT MINING CO. LIMITED v. DOMINION REDUCTION CO. LIMITED*, 177.

Pim v. Municipal Council of Ontario (1860), 9 U.C.C.P. 302, applied. *WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS*, 584.

Pinchin v. London and Blackwall R.W. Co. (1854), 5 DeG. M. & G. 851, referred to. *SNOW v. CITY OF TORONTO*, 623.

Pinhey v. Mercantile Fire Insurance Co. (1901), 2 O.L.R. 296, approved and followed. *STADON v. LIVERPOOL-MANITOBA ASSURANCE Co.*, 355.

Prittie and Toronto, In re (1892), 19 A.R. 503, referred to. *SNOW v. CITY OF TORONTO*, 623.

Ramsden v. Dyson (1866), L.R. 1 H.L. 129, followed. *HUBBS v. BLACK*, 545.

Rex v. Bickley (1909), 73 J.P. 239, followed. *REX v. McCANOR*, 482.

Rex v. McDevitt (1917), 39 O.L.R. 138, 140, followed. *Re BUTTERWORTH AND CITY OF OTTAWA*, 84.

CASES—(Continued.)

Rex v. Melvin (1916), 38 O.L.R. 231, distinguished. *REX v. NAZZARENO*, 36.

Rex v. Robinson, [1915] 2 K.B. 342, 348, applied. *STONE v. WORLD NEWSPAPER Co. LIMITED*, 33.

Rhodesia Goldfields Limited, In re, [1910] 1 Ch. 239, 246, 247, followed. *Re BAILEY COBALT MINES LIMITED, BAILEY COBALT MINES LIMITED v. BENSON*, 1.

Robinson v. Beaconsfield Rural District Council, [1911] 2 Ch. 188, followed. *Re WATERLOO LOCAL BOARD OF HEALTH, CAMPBELL'S CASE*, 338.

Roth v. South Easthope Farmers Mutual Fire Insurance Co. (1917), 41 O.L.R. 52, varied. *ROTH v. SOUTH EASTHOPE FARMERS MUTUAL FIRE INSURANCE Co.*, 186.

Rumball v. Wright (1824), 1 C. & P. 589, distinguished. *TORONTO GENERAL HOSPITAL TRUSTEES v. SABISTON*, 639.

Sachs v. Henderson, [1902] 1 K.B. 612, followed. *Re GLASS v. GLASS*, 236.

Scandinavian American National Bank v. Kneeland (1914), 8 W.W.R. 61, followed. *MOLSONS BANK v. CRANSTON*, 58.

Sandwich, Town of, and Sandwich Windsor and Amherstburg R.W. Co., Re (1910), 2 O.W.N. 93, 98, followed. *Re TORONTO R.W. CO. AND CITY OF TORONTO*, 381.

Severn v. The Queen (1878), 2 Can. S.C.R. 70, 103, followed. *Re TORONTO R.W. CO. AND CITY OF TORONTO*, 381.

Smith v. Ontario and Minne-

CASES—(Continued.)

sota Power Co. Limited (1918), 42 O.L.R. 167, varied. SMITH V. ONTARIO AND MINNESOTA POWER CO. LIMITED, 43.

Solicitor, Re (1917), 12 O.W.N. 191, distinguished. LYNCH-STAUNTON V. SOMERVILLE, 575.

Steel Co. of Scotland v. Tancred Arrol & Co. (1899), 26 Sc.L. Repr. 305, 314, followed. SUSMAN V. BAKER, 39.

Stephens and Township of Moore, Re (1894), 25 O.R. 600, 605, approved. *Re* LABUTE AND TOWNSHIP OF TILBURY NORTH, 522.

Stevens v. Jeacocke (1884), 11 Q.B. 731, followed. WALSH V. INTERNATIONAL BRIDGE AND TERMINAL Co., 117.

Superior Copper Co. Limited v. Perry (1918), 42 O.L.R. 45 referred to. SUPERIOR COPPER Co. LIMITED V. PERRY AND SUTTON, 24.

Sydney Post Publishing Co. v. Kendall (1910), 43 Can. S.C.R. 461, distinguished. WILSON V. LONDON FREE PRESS PRINTING Co., 12.

Talbot v. Poole (1893), 15 P.R. 274, approved. FLEXLUME SIGN Co. LIMITED V. GLOBE SECURITIES Co., 277.

Temiskaming Telephone Co. Limited v. Town of Cobalt (1918), 42 O.L.R. 385, reversed. TEMISKAMING TELEPHONE Co. LIMITED V. TOWN OF COBALT, 366.

Toomey v. London Brighton and South Coast R.W. Co. (1857), 3 C.B.N.S. 146, 150, followed. O'DELL V. TORONTO R.W. Co., 350.

Toronto and Niagara Power Co.

CASES—(Continued.)

v. Town of North Toronto (1912), 25 O.L.R. 475, [1912] A.C. 834, distinguished. SUPERIOR COPPER Co. LIMITED V. PERRY AND SUTTON, 24.

Toronto, City of, v. Gillespie (1893), *Coutlee's Digest*, cols. 873, 874, followed. FLEMING V. TOWN OF SANDWICH, 514.

Toronto, City of, v. Toronto Railway (1908), 16 O.L.R. 205, explained. CITY OF TORONTO V. TORONTO R.W. Co., 308.

Toronto, City of, v. Toronto R.W. Co. (1918), 42 O.L.R. 603, affirmed with a variation. CITY OF TORONTO V. TORONTO R.W. Co., 308.

Trust and Loan Co. v. Ruttan (1877), 1 Can. S.C.R. 564, 583, followed. MOLSONS BANK V. CRANSTON, 58.

Tyrrell v. Tyrrell (1918), 43 O.L.R. 272, followed. HALL MOTORS LIMITED V. F. ROGERS & Co., 327.

Unexcelled Fire-Works Co. v. Polites (1890), 130 Penn. St. 536, followed. MASON & RISCH LIMITED V. CHRISTNER, 146.

Union Bank of Canada v. A. McKillop & Sons Limited (1913-15), 30 O.L.R. 87, 51 Can. S.C.R. 518, distinguished. BANK OF OTTAWA V. HAMILTON STOVE AND HEATER Co., 93.

Union Bank of Canada v. Makepeace (1917), 40 O.L.R. 368, reversed. UNION BANK OF CANADA V. MAKEPEACE, 202.

Wade v. Rochester German Fire Insurance Co. (1911), 23 O.L.R. 635, distinguished. STADDON V. LIVERPOOL-MANITOBA ASSURANCE Co., 355.

CASES—(Continued.)

Walker v. Midland R.W. Co. (1886), 2 Times L.R. 450, followed. *WALSH v. INTERNATIONAL BRIDGE AND TERMINAL Co.*, 117.

Walsh v. Lonsdale (1882), 21 Ch.D. 9, followed. *TORONTO GENERAL HOSPITAL TRUSTEES v. SABISTON*, 639.

Warner v. Jacob (1882), 20 Ch.D. 220, approved and followed. *HOEHN v. MARSHALL*, 241.

Waterous Engine Works Co. v. Town of Palmerston (1892), 21 Can. S.C.R. 556, explained and distinguished. *WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS*, 584.

Watkins v. Nash (1875), L.R. 20 Eq. 262, followed. *MOLSONS BANK v. CRANSTON*, 58.

Whitfield v. Todd (1844), 1 U.C.R. 223, 224, 225, referred to. *STONER v. SKENE*, 609.

Wilson v. Botsford-Jenks Co. (1902), 1 O.W.R. 101, followed. *O'DELL v. TORONTO R.W. Co.*, 350.

Wilson v. Tummon (1843), 12 L.J.C.P. 306, followed. *MCCALLUM v. COHOE*, 497.

Winnipeg Electric R. Co. v. City of Winnipeg (1916), 30 D.L.R. 159, distinguished. *Re TORONTO R.W. Co. AND CITY OF TORONTO*, 381.

Winterbottom v. Ingham (1845), 7 Q.B. 611, distinguished. *TORONTO GENERAL HOSPITAL TRUSTEES v. SABISTON*, 639.

Wood v. Haines (1917), 38 O.L.R. 583, 586, followed. *SUSMAN v. BAKER*, 39.

Workman v. Great Northern

CASES—(Continued.)

R.W. Co. (1863), 32 L.J.Q.B. 279, followed. *SMITH v. ONTARIO AND MINNESOTA POWER Co. LIMITED*, 43.

CEMETERY.

Use of Land in Town for Cemetery Purposes—Approval of Provincial Board of Health—Agreement between Owner of Land and Town Corporation—Covenant by Owner to Pay Annual Sum to Corporation in Lieu of Taxes—Consideration—Covenant by Corporation never to Prohibit Use of Land for Interment of Dead—Cemetery Act, R.S.O. 1914, ch. 261, sec. 37—Covenant Illegal and Void—Failure of Consideration—Owner's Covenant not Enforceable—Public Policy—Agreement under Seal—Corporation Sole—Suggested Legalisation of Agreement by Legislature.

TOWN OF EASTVIEW v. ROMAN CATHOLIC EPISCOPAL CORPORATION OF OTTAWA, 284.

See **CONTRACT**, 2.

CHARGE ON LAND.

See **RAILWAY**, 1.

CHEQUE.

See **BILLS OF EXCHANGE**.

COLLISION.

See **NEGLIGENCE**, 1.

COMPANY.

1. *Application for Shares—Misrepresentations by Agent of Company—"Statement" Shewn to Purchaser—"Prospectus"—Ontario Companies Act, R.S.O. 1914,*

COMPANY—(Continued.)

ch. 178, secs. 99 (101) (3)—*Ab-
sence of Allotment and Notice—
Rescission of Application—Re-
turn of Money Paid.*

MCCURDY V. OAK TIRE AND
RUBBER CO. LIMITED, 571.

2. *Powers of Manufacturing
Company Incorporated by Domin-
ion Authority — Guarantee of
Account of another Company with
Bank—Special Clause in Charter
—Business Conducted so as Di-
rectly to Benefit Company—Ab-
sence of Direct Authorisation by
Directors or Shareholders—Instru-
ment Executed under Seal of Com-
pany and Hands of General
Manager and Secretary—Liability
of Company.*

BANK OF OTTAWA V. HAMILTON
STOVE AND HEATER CO., 93.

3. *Winding-up — Claim upon
Assets by Assignees of Judgment
against Company—Judgment Ob-
tained by Company against As-
signor (Director) for Damages for
Misfeasance—Set-off—Equity—
Right to Dividend—Notice of As-
signment—Bona Fides of Assign-
ment—Superior Position of As-
signees—Retention of Dividend
until Amount of Judgment against
Assignor Contributed.*

RE BAILEY COBALT MINES
LIMITED, BAILEY COBALT MINES
LIMITED V. BENSON, 1.

See BROKERS—CONSPIRACY—
GUARANTY, 2—TELEPHONE COM-
PANY—WRIT OF SUMMONS.

COMPENSATION

See MUNICIPAL CORPORATIONS,
3—WATER.

CONDITIONAL APPEARANCE.

See WRIT OF SUMMONS.

CONDITIONS.

See GUARANTY, 2—MUNICIPAL
CORPORATIONS, 6 — WATER —
WILL, 2.

CONFISCATION.

See ONTARIO TEMPERANCE
ACT, 3.

CONSENT.

See CONSPIRACY—CONTRACT,
4—INSURANCE, 1 — TELEPHONE
COMPANY.

CONSIDERATION.

See CEMETERY—CONTRACT, 2
—FRAUDULENT CONVEYANCE—
HUSBAND AND WIFE.

CONSPIRACY.

*Assault—Attempted Removal by
Force of Member of Religious
Society from House of Society to
Lunatic Asylum — Actionable
Wrongs — Findings of Special
Jury—Liability of Several De-
fendants—Roman Catholic Epis-
copal Corporation—Corporation
Sole—Incorporating Act, 8 Vict.
ch. 82, sec. 6—Capacity of Cor-
poration—Extension of Powers of
Corporations by Ontario Com-
panies Act, sec. 210 (6 Geo. V. ch.
35, sec. 6)—Liability of Society
Incorporated under Ontario Ben-
evolent Societies Act, 37 Vict. ch.
34—Power to Authorise Forcible
Removal of Member—Effect of
Resolution of Council of Society—
Acts of Chief Officer of Society—
Personal Liability—Participation
of Bishop of Diocese and Physi-
cian—Admission of Evidence of*

CONSPIRACY—(Continued.)

Acts Committed after Assault—Examination for Discovery—Evidence at Trial—Rule 330—Damages—Defendants not Acting in Good Faith—Punitive Damages—Separate Assessments against Several Defendants—Consent of all Parties.

BASIL V. SPRATT, 155.

CONSTITUTIONAL LAW.

Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140—Power of Ontario Legislature to Create Lien Effective against Dominion Railway—Action to Enforce Lien—Personal Judgment under sec. 49—Jurisdiction of Court—Charge on Percentage to be Retained by Owner—Sec. 12 (3) of Act—Trial—Jurisdiction of Provincial Officers—Sec. 33 (6 Geo. V. ch. 30, sec. 1)—British North America Act, secs. 92 (14), 96.

JOHNSON & CAREY CO. V. CANADIAN NORTHERN R.W. CO., 533.

See STREET RAILWAY, 4.

CONTRACT.

1. Excavation Work—Payment for, at Price per Cubic Yard—Exception—"Rock"—Removal of Boulders—Inclusion in Exception—Evidence—Local Custom—Explanation of Meaning of Doubtful Words.

MILLS V. CONTINENTAL BAG AND PAPER CO., 71.

2. Right of Burial in Cemetery Plot—Agreement between Brother and Sister—Oral Evidence to Establish—Statute of Frauds—Corroboration—Consideration—

CONTRACT—(Continued.)

Part Performance—Nature and Effect of Agreement—Grant of Land—Possession—Limitations Act—Easement or License—Easement in Gross—Rules of Equity—Equitable Jurisdiction of County Courts—Implied License to Enter Plot to Care for Graves—Implied Agreement not to Revoke License—Death of Grantor—Claim by Devisee—Trespass—Removal of Corpse—Injunction—Release of Claims against Estate—Amendment—Counterclaim—Declaration of Rights.

HUBBS V. BLACK, 545.

3. Sale and Delivery of Goods at Named Prices per Ton—Breach—Deficiencies in Deliveries—"About"—"Approximate"—Damages—Allowances—Mistake in Wording of Written Contract—Finding of Referee—Discrediting of Witnesses—Appeal.

SUSMAN V. BAKER, 39.

4. Sale of Goods—Specific Articles—Second-hand Motor-trucks—Subsequent Contract for Installation of Substituted Engines—Action for Price of Engines and other Items of Account—Defence—Goods and Services Supplied in Endeavour to Implement Contract of Vendors—Failure to Prove—Counterclaim for Return of Money Paid on Account of Price of Trucks—Property Passing—Absence of Foundation for Contention that Contract Void—Leave to Litigate Counterclaim in Separate Action Improperly Granted by Trial Judge without Consent—Counterclaim for Damages for

CONTRACT—(Continued.)

Breach of Original Contract—Undertaking by Vendors to Overhaul Trucks and Put them in "A1 Shape Mechanically"—Construction—Evidence—Failure to Prove Breach and Consequent Damage.

HALL MOTORS LIMITED v. F. ROGERS & Co., 327.

5. *Sale of Set of Law Reports at Fixed Price per Volume—"150 Volumes more or less"—Estimate—Liability of Vendee to Pay for Volumes in Excess of 150.*

BOSTON LAW BOOK CO. v. CANADA LAW BOOK CO. LIMITED, 529.

See CEMETERY—MUNICIPAL CORPORATIONS, 1—NUISANCE—SALE OF GOODS—STREET RAILWAY, 1—TELEPHONE COMPANY—VENDOR AND PURCHASER—WATER.

CONTRIBUTION.

See COMPANY, 3.

CONVERSION.

See DIVISION COURTS.

CONVICTION.

See ALIEN ENEMY—CRIMINAL LAW—ONTARIO TEMPERANCE ACT.

CORPORATION.

See COMPANY—MUNICIPAL CORPORATIONS.

CORPORATION SOLE.

See CEMETERY—CONSPIRACY.

CORPSE.

See CONTRACT, 2.

CORRESPONDENCE.

See CRIMINAL LAW, 1.

CORROBORATION.

See CONTRACT, 2—ONTARIO TEMPERANCE ACT, 2.

COSTS.

1. *Counsel Fees—Taxation between Party and Party of Defendants' Costs of Several Actions Stayed to Abide the Result of another Action—No Actual Trial—Right of Defendants to Give Notices and Set down for Trial—"Counsel Fee at Trial"—Solicitor (as counsel) Taking his own Brief—Quantum of Counsel Fees—Discretion of Taxing Officer—Interference with in Special Circumstances—Fee Allowed in each Action—Appeal to Divisional Court from Order of Judge in Chambers on Appeal from Taxation—Right to Appeal without Leave—Rule 507.*

FLEXLUME SIGN CO. LIMITED v. GLOBE SECURITIES CO., 277.

2. *Taxation—Appeal—Items Disallowed by Local Officer—Fees Paid to Witnesses Examined upon Foreign Commission—Preparation for Trial—Costs Thrown away by Reason of Postponements of Trial—Special Order for Payment—Tariff "A," Item 6—Allowance for Correspondence—Tariff Item 16—Costs of Interlocutory Motions for Postponements—Expert Witnesses—Preparation of Photographs—Rule of 24th December, 1913—Fees Paid to Foreign Witnesses—Reasonable and Necessary Payments—Evi-*

COSTS—(Continued.)

dence—Reconsideration of Items by Principal Taxing Officer.

NEWCOMBE v. EVANS, 628.

See ALIEN ENEMY—FRAUDULENT CONVEYANCE — HUSBAND AND WIFE — INSURANCE, 2 — LIBEL, 1—MORTGAGE, 2—MUNICIPAL CORPORATIONS, 6 — RAILWAY, 1 — SOLICITOR — STREET RAILWAY, 2.

COUNSEL FEES.

See COSTS, 1.

COUNTERCLAIM.

See CONTRACT, 2, 4.

COUNTY COURTS.

See CONTRACT, 2.

COUPONS.

See RAILWAY, 1.

COURT OF REVISION.

See MUNICIPAL CORPORATIONS, 4.

COURTS.

See DIVISION COURTS—STREET RAILWAY, 4.

COVENANT.

See CEMETERY — LANDLORD AND TENANT—MORTGAGE, 1—VENDOR AND PURCHASER, 1.

CREDITORS.

See FRAUDULENT CONVEYANCE.

CRIMINAL LAW.

1. *Bigamy — Woman Going through Form of Marriage with Man Knowing that Man's Wife still Living—Evidence—Proof of*

CRIMINAL LAW—(Continued.)

First Marriage—Foreign Law—Justice of the Peace—Correspondence — Admissibility—Sufficiency to Warrant Conviction — Stated Case—Form of Question.

REX v. DEBARD, 427.

2. *New Trial—Powers of Trial Judge—Criminal Code, sec. 1021—Leave to Move Court of Appeal for New Trial on Ground that Verdict against Weight of Evidence — Conviction for Manslaughter — Evidence—Affidavit of Witness Contradicting Testimony Given at Trial—Admissibility—Verdict not against Weight of Evidence—Refusal of Leave—Question of Law Reserved for Court of Appeal.*

REX v. DI FRANCESCO, 75.

See ALIEN ENEMY—LIBEL, 1—ONTARIO TEMPERANCE ACT.

CROWN LANDS.

See WATER.

CUSTOM.

See CONTRACT, 1.

DAM.

See WATER.

DAMAGES.

See CONTRACT, 3, 4—CONSPIRACY—MUNICIPAL CORPORATIONS, 3—SALE OF GOODS — STREET RAILWAY, 1, 2—VENDOR AND PURCHASER, 1—WATER.

DEATH.

See CONTRACT, 2—HIGHWAY—NEGLIGENCE, 2—SEDUCTION — WILL.

DECLARATION OF RIGHTS.*See* CONTRACT, 2.**DEED.***See* FRAUDULENT CONVEYANCE
—VENDOR AND PURCHASER, 1.**DEFAMATION.***See* LIBEL.**DEPOSIT OF TAILINGS.***See* LAND.**DETECTIVES.***See* ONTARIO TEMPERANCE
ACT, 2.**DIRECTORS.***See* COMPANY, 3—GUARANTY,
2.**DISCHARGE OF MORTGAGE.***See* VENDOR AND PURCHASER,
2.**DISCOVERY.***Production of Documents by
Stranger to Action—Rule 350.*
McCURDY v. OAK TIRE AND
RUBBER CO. LIMITED, 235.*See* CONSPIRACY.**DISCRETION.***See* COSTS, 1 — MUNICIPAL
CORPORATIONS, 6.**DISTRICT COURT JUDGE.***See* ONTARIO TEMPERANCE ACT,
2.**DITCHES.***See* HIGHWAY.**DIVIDENDS.***See* COMPANY, 3.**DIVISION COURTS.***Jurisdiction—Claim for \$96 for
Conversion of Goods — Division
Courts Act, sec. 62 (1).**RE GLASS v. GLASS, 236.***DOCUMENTS.***See* DISCOVERY.**DOMINION RAILWAY.***See* CONSTITUTIONAL LAW.**DRAINAGE.***See* MUNICIPAL CORPORATIONS,
2, 3.**DURESS.***See* HUSBAND AND WIFE.**EASEMENT.***See* CONTRACT, 2—MUNICIPAL
CORPORATIONS, 3.**ELECTION.***See* LANDLORD AND TENANT.**ENCROACHMENT.***See* VENDOR AND PURCHASER,
1.**ENGINEER.***See* MUNICIPAL CORPORATIONS,
2—RAILWAY, 2.**EQUITABLE JURIS-
DICTION.***See* CONTRACT, 2.**ESCROW.***See* GUARANTY, 2.**ESTIMATE.***See* CONTRACT, 5.**ESTOPPEL.***See* GUARANTY, 2—HUSBAND
AND WIFE.

EVIDENCE.

See ALIEN ENEMY—BROKERS
—CONSPIRACY—CONTRACT, 1, 2
—COSTS, 2—CRIMINAL LAW, 1,
2—FRAUDULENT CONVEYANCE—
HIGHWAY—HUSBAND AND WIFE
—LAND—NEGLIGENCE, 1—
NUISANCE—ONTARIO TEMPER-
ANCE ACT, 1, 2, 3—SOLICITOR—
STREET RAILWAY, 2—VENDOR
AND PURCHASER, 1—WILL, 1.

EXCAVATION.

See CONTRACT, 1.

EXECUTED CONTRACT.

See MUNICIPAL CORPORATIONS,
1.

EXECUTION.

*Judgment Declaring Right to
Future Payments—Absence of
Direction for Payment or Recovery
—Rule 533—Execution Issued
upon Judgment after Accrual of
Future Payments—Irregularity
—Judgment Entered in Conform-
ity with Judgment Pronounced—
Supplementary Order for Pay-
ment of Sums Accrued Due—
Rule 523—Scope of—Effect
of Subsequent Legislation and
Amendments of Constitution of
Friendly Society upon Rights
Passed into Judgment—Ontario
Insurance Act, R.S.O. 1897, ch.
203, sec. 163, sub-secs. 5 and 6
(3 Edw. VII. ch. 15, sec. 8)—
5 Geo. V. ch. 30—7 Geo. V. ch. 99.*

*GRAINGER V. ORDER OF CAN-
ADIAN HOME CIRCLES, 53.*

EXECUTION CREDITORS.

See FRAUDULENT CONVEYANCE.

EXECUTORS.

See VENDOR AND PURCHASER,
2.

EXECUTORY CONTRACT.

See SALE OF GOODS.

EX PARTE ORDER.

See MORTGAGE, 1.

EXPROPRIATION.

See MUNICIPAL CORPORATIONS,
3.

FIRE INSURANCE.

See INSURANCE.

FOREIGN COMMISSION.

See COSTS, 2.

FOREIGN DEFENDANTS.

See WRIT OF SUMMONS.

FOREIGN LAW.

See CRIMINAL LAW, 1.

FORFEITURE.

See LANDLORD AND TENANT—
WILL, 2.

FRANCHISE.

See TELEPHONE COMPANY.

**FRAUD AND MIS-
REPRESENTATION.**

See COMPANY, 1—MORTGAGE,
2.

**FRAUDULENT CONVEY-
ANCE.**

*Action by Execution Creditors
of Husband to Set aside Convey-
ances of Land by Husband to
Wife—Evidence—Finding of Fact
—Belief of both Parties that Wife
True Owner—Absence of Desire on
Part of Husband to Defeat, Hinder,*

FRAUD. CON.—(Continued.)
or Delay Creditors—Desire on Part of Wife to Prevent Property Falling into Hands of Husband's Creditors—Circumstances Negating Intent to Defraud—Consideration for Conveyances—Dismissal of Action—Costs.

BANK OF MONTREAL V. STAIR,
 79.

FRIENDLY SOCIETY.
See EXECUTION.

GROUND-LEASE.
See LANDLORD AND TENANT.

GUARANTY.

1. *Account of Trading Company with Bank—Liability of Guarantor—Assignment by Company for Benefit of Creditors under Assignments and Preferences Act—Securities Held by Bank—Mortgage on Company's Land—Conveyance of Equity of Redemption from Assignee to Bank—Acceptance in Satisfaction of Bank's Claim—Release of Guarantor from Liability as Surety—Absence of Reservation of Bank's Rights against Surety—Interference with Surety's Rights—Merger—Intention—Account—Application of Payments.*

UNION BANK OF CANADA V. MAKEPEACE, 202.

2. *Loan by Bank to Commercial Company—Agreement of Directors of Company to Guarantee Repayment—Execution of Bond by all Directors but one—Condition as to Execution by all—Knowledge of, by Manager of Bank—Advance of Part of Sum upon Uncompleted Instrument De-*

GUARANTY—(Continued.)
livered to Manager—Circumstances Shewing Conditional Delivery—Escrow—Provision in Bond that Individual Signers Bound notwithstanding Non-execution by others—Provision not Operative till Execution Complete—Effect of Delivery to Oblige, not to Stranger—Personal Liability of one Director from Conduct—Estoppel—Duty to Bank—Knowledge of Condition.

MOLSONS BANK V. CRANSTON,
 58.

See COMPANY, 2—RAILWAY, 2.

HIGHWAY.

Nonrepair—Ditch Running alongside of Travelled Road for 50 Miles—Ditch Constructed under Authority of Municipal Drainage Act—Duty of Township Corporations Responsible for Safety of Travel upon Road—Absence of Fence or Guard-rail—Clay Road—Failure to Shew Negligence in Maintenance—Motor-vehicle on Highway Sliding into Ditch and Causing Death of Passenger—Proximate Cause—Negligence of Owner-driver—Evidence.

ANDERSON V. TOWNSHIPS OF ROCHESTER AND MERSEA, 301.

See MUNICIPAL CORPORATIONS, 1, 4—NEGLIGENCE, 1—STREET RAILWAY—TELEPHONE COMPANY.

HUSBAND AND WIFE.

Liability of Wife on Promissory Note and Agreement Signed for Benefit of Husband—Duress—Threat of Prosecution—Implied Promise not to Prosecute—Agency

HUSB. & WIFE—(Continued.)

of Stranger for Person in whose Favour Note and Agreement Made—Finding of Trial Judge—Knowledge—Ratification—Estoppel—Evidence—Appeal—Undue Influence of Husband—Want of Independent Advice—Onus—Consideration—Pleading—Amendment—Practice—Omission to Call Attention to Claim upon Agreement in Settling Judgment of Trial Judge—Correction upon Appeal—Costs.

McCALLUM v. COHOE, 497.

See CRIMINAL LAW, 1—FRADULENT CONVEYANCE—STREET RAILWAY, 2.

IMPROVEMENTS.

See MUNICIPAL CORPORATIONS, 4.

INDEPENDENT ADVICE.

See HUSBAND AND WIFE.

INDEPENDENT CONTRACTOR.

See NUISANCE.

INJUNCTION.

See CONTRACT, 2—MUNICIPAL CORPORATIONS, 5.

INSURANCE.

1. *Fire Insurance—Assignment of Property Insured without Written Permission of Company—Policy Void under Statutory Condition 3 (Ontario Insurance Act, sec. 194)—Insurance Effected by Owner—Sale and Conveyance to Purchaser and Mortgage Made to Grantor for Part of Purchase-money—Subsequent Conveyances*

INSURANCE—(Continued.)

of Equity of Redemption—Assignment of Policy by Original Owner (Mortgagee) to Transferee of Equity, with Loss Payable to Mortgagee as Interest may Appear—Consent by Company to Assignment—Effect of—Sec. 198 of Act—Subsequent Assignment by Mortgagee of Interest in Policy and all Moneys Payable thereunder to Owner Paying off Mortgage and Obtaining Discharge—Effect of.

STADDEN v. LIVERPOOL-MANITOBA ASSURANCE CO., 355.

2. *Fire and Lightning Insurance—Barn Struck by Lightning—Further Injury by Wind—Proximate Cause—Finding of Fact of Trial Judge—Appeal—Produce in Barn—Neglect to Put in Safe Place—Injury by Rain—Variation of Judgment of Trial Judge—Costs of Appeal.*

ROTH v. SOUTH EASTHOPE FARMERS MUTUAL FIRE INSURANCE CO., 186.

INTEREST.

See RAILWAY, 2.

INTOXICATING LIQUORS.

See ONTARIO TEMPERANCE ACT.

INVITATION.

See NEGLIGENCE, 2.

JUDGE'S CHARGE.

See NEGLIGENCE, 1.

JUDGE IN CHAMBERS.

See MORTGAGE, 1.

JUDGMENT.

See COMPANY, 3—CONSTITUTIONAL LAW — EXECUTION — HUSBAND AND WIFE — INSURANCE, 2.

JURISDICTION.

See CONSTITUTIONAL LAW—CONTRACT, 2—DIVISION COURTS—LIBEL, 1—NUISANCE—ONTARIO TEMPERANCE ACT, 3—RAILWAY, 2—STREET RAILWAY, 1, 4—WRIT OF SUMMONS.

JURY.

See LIBEL, 2—NEGLIGENCE, 1, 2—STREET RAILWAY, 2.

JUSTICE OF THE PEACE.

See ALIEN ENEMY—CRIMINAL LAW, 1—ONTARIO TEMPERANCE ACT.

LACHES.

See BILLS OF EXCHANGE.

LAND.

Deposit on, of Tailings, by Neighbour, with Permission of Owner—Property in Tailings—Evidence—License—Conduct of Parties.

PETERSON LAKE SILVER COBALT MINING CO. LIMITED v. DOMINION REDUCTION CO. LIMITED, 177.

See MUNICIPAL CORPORATIONS—VENDOR AND PURCHASER.

LANDLORD AND TENANT.

Ground-lease—Covenant for Renewal—Rent to be Fixed by Arbitration—Award not Made until after Expiry of Original Lease—Refusal of Tenant to Accept New Lease at Rental Fixed by Award—Forfeiture—Claim for Use and

LAND. & TEN'T.—(Continued.)

Occupation of Land from Expiry of Lease until Election to Refuse New Lease—Liability for Rent Fixed by Award—Reasonable Sum Fixed as Occupation Rent on Basis of Rents Received and Taxes in Arrear, with Abatement—Agreement for Reduced Rent—Effect of.

TORONTO GENERAL HOSPITAL TRUSTEES v. SABISTON, 639.

LEASE.

See LANDLORD AND TENANT.

LEAVE TO APPEAL.

See CRIMINAL LAW, 2.

LIBEL.

1. *Newspaper—Security for Costs—Libel and Slander Act, sec. 12 (1)—Jurisdiction of Master in Chambers—Words “Involving a Criminal Charge”—Sec. 12 (2)—Attributing to Plaintiff Intention to Commit Suicide—Criminal Code, secs. 269, 270.*

STONE v. WORLD NEWSPAPER CO. LIMITED, 33.

2. *Question whether Words Used Defamatory—Question for Jury—Judge's Charge—Words Capable of Defamatory Meaning—General Verdict for Defendants—Libel and Slander Act, sec. 5—Trifling Damage—Interpretation of Verdict—Application for New Trial.*

WILSON v. LONDON FREE PRESS PRINTING CO., 12.

LICENSE.

See CONTRACT, 2—LAND.

LIEN.

See CONSTITUTIONAL LAW—
RAILWAY, 1.

LIGHTNING.

See INSURANCE, 2.

LIMITATION OF ACTIONS.

See CONTRACT, 2—RAILWAY, 2
—WILL, 2.

LOAN OF MONEY.

See GUARANTY, 2.

LOAN OF STOCK.

See BROKERS.

**LOCAL BOARD OF
HEALTH.**

See NUISANCE.

LOCAL IMPROVEMENTS.

See MUNICIPAL CORPORATIONS,
4.

MAGISTRATE.

See ALIEN ENEMY—CRIMINAL
LAW—ONTARIO TEMPERANCE
ACT.

MANDAMUS.

See WILL, 2.

MANSLAUGHTER.

See CRIMINAL LAW, 2.

**MANUFACTURING
COMPANY.**

See COMPANY, 2.

MARRIAGE.

See CRIMINAL LAW, 1.

**MARRIED WOMEN'S
PROPERTY ACT.**

See SEDUCTION.

MASTER IN CHAMBERS.

See LIBEL, 1.

MECHANICS' LIENS.

See CONSTITUTIONAL LAW.

MERGER.

See GUARANTY, 1.

MINING COMPANY.

See WRIT OF SUMMONS.

MISFEASANCE.

See COMPANY, 3.

MISTAKE.

See CONTRACT, 3 — VENDOR
AND PURCHASER, 1.

MORATORIUM.

See MORTGAGE, 1.

MORTGAGE.

1. *Order of Local Judge Authorising Commencement of Action for Foreclosure and on Covenant—Mortgagors and Purchasers Relief Act, 1915, secs. 2 (2), 5 (2)—Notice of Application for Order not Given to Mortgagor Liable on Covenant—Service of Notice Dispensed with—Order Improperly Made ex Parte—Power of Judge in Chambers to Rescind—Rules 217, 505 (1)—Action Commenced Pursuant to Order — Writ of Summons Set aside.*

COPELAND V. MERTON, 645.

2. *Power of Sale—Short Forms of Mortgages Act — Power in Statutory Form — Additional Power — Reference to Statutory Power — Right of Assignee of Mortgagee to Exercise Additional Power—Action by Executor of*

MORTGAGE—(Continued.)

Mortgagor to Set aside Sale and Conveyance under Power—Sale Made in Good Faith and without Collusion—Inadequacy of Price—Sale at Undervalue—Effect of—Dismissal of Action—Unfounded Charges of Fraud—Costs.

HOEHN V. MARSHALL, 241.

See INSURANCE, 1—RAILWAY—VENDOR AND PURCHASER, 2.

MORTGAGORS AND PURCHASERS RELIEF ACT.

See MORTGAGE, 1.

MOTOR VEHICLES.

See HIGHWAY—NEGLIGENCE, 1.

MUNICIPAL CORPORATIONS

1. *Contract for Erection of Bridge—Sealed Agreement between Contractor and Township Corporation—Interpretation of—Fulfilment of Contract—Payment of Part of Price—Acceptance and User of Bridge—Findings of Fact of Trial Judge—Affirmance on Appeal—Absence of By-law Authorising Contract—Municipal Act, sec. 249 (1)—Necessary Work in Fulfilment of Obligation to Keep Highway in Repair (sec. 460 (1))—Executed Contract—Failure to Plead Want of By-law—Amendment not Asked for—Rule 183.*

WITHERSPOON V. TOWNSHIP OF EAST WILLIAMS, 584.

2. *Drainage—Complaint of Ratepayer to Township Council as to Want of Repair of Existing Drain—Resolution of Council Requiring Engineer to Make a Sur-*

MUN. CORPS.—(Continued.)

vey and Report—Report of Engineer Recommending New Scheme of Work and Assessment—Adoption by Council—Ratification—By-law Passed to Carry Report into Effect—Powers of Council—Municipal Drainage Act, secs. 75, 77.

RE LABUTE AND TOWNSHIP OF TILBURY NORTH, 522.

3. *Land Entered upon and Excavated for Sewer—Drainage System—By-law Passed in 1913—Intra Vires—Municipal Act, 1903, secs. 2 (8), 554—Expropriation of "Easement"—Compensation—Damages.*

SNOW V. CITY OF TORONTO, 623.

4. *Opening Street through Land Owned by Plaintiff—Local Improvement Work Initiated by Town Council under sec. 9 of Local Improvement Act—Assessment of Cost—By-law Differing from Notice Given under sec. 11—Necessity for Strict Compliance with Statutory Requirements—Invalidity of By-law and Assessment—Remedy by Appeal to Court of Revision under sec. 36.*

FLEMING V. TOWN OF SANDWICH, 514.

5. *Urban Municipality—Application of School Board to Council for Sum for Purchase of Site and Erection of School—Submission to Electors—Vote Negating Application—Renewal of Application—Refusal to Pass By-law—Resolution of Council Authorising Submission to Electors of Original Question and two Additional Questions—Duty of*

MUN. CORPS.—(Continued.)

Council under sec. 43 of Public Schools Act, R.S.O. 1914, ch. 266
—Municipal Act, R.S.O. 1914, ch. 192, sec. 398 (10)—Question Specifically Authorised—Injunction Restraining Submission of Additional Questions.

BURLINGTON PUBLIC SCHOOL BOARD V. TOWN OF BURLINGTON, 561.

6. *Urban Municipality — By-law Requiring Weighing of Coal and Coke on Public Weighing Machines—Power of Council to Pass—Municipal Act, sec. 401, para. 13 (8 Geo. V. ch. 32, sec. 8 (1))—"With the Approval of the Municipal Board" — Conditions which may be Prescribed by Order of Board—Approval Given after Passing of By-law—No Conditions Imposed—Motion to Quash By-law—Discretion—Costs.*

RE BUTTERWORTH AND CITY OF OTTAWA, 84.

See CEMETERY — HIGHWAY — NUISANCE — RAILWAY, 2 — STREET RAILWAY, 1 — TELEPHONE COMPANY—WILL, 2.

NATIVE WINE.

See ONTARIO TEMPERANCE ACT, 1.

NAVIGABLE RIVER.

See WATER.

NEGLIGENCE.

1. *Collision upon Highway of Automobile and Electric Street-car — Injury to Automobile and Driver — Action Brought by Driver — Addition of Owner as Co-plaintiff — Rule 134 (2) — Pleading —*

NEGLIGENCE.—(Continued.)

Judge's Charge—Findings of Jury — Operation of "Backing" Street-car—Control from Front—Question for Ontario Railway and Municipal Board—Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186—55 Vict. ch. 99, sched., cl. 36—Negligence of Conductor—"Misjudging Course of Automobile"—Failure of Driver of Automobile to Give Signal when Turning—Reversal of Judgment for Plaintiffs—Ground for New Trial not Shewn—Evidence of what Conductor Said Immediately after Collision—Inadmissibility.

O'DELL V. TORONTO R.W. Co., 350.

2. *Death of Plaintiff's Husband by Falling through Railway Bridge — Construction and Maintenance of Bridge under Authority of Act Incorporating Bridge Company, 4 & 5 Edw. VII. ch. 108 (D.)—Absence of Flooring — Railway Act, 1903, 3 Edw. VII. ch. 58, sec. 180—Order of Board of Railway Commissioners Requiring Gates or Watchmen at Railway Crossing—Non-compliance with—No Statutory or Common Law Duty Owed to Deceased—Findings of Jury—Trespasser — Invitee — Implied Invitation.*

WALSH V. INTERNATIONAL BRIDGE AND TERMINAL Co., 117.

See HIGHWAY—STREET RAILWAY, 2, 3—WATER.

NEW TRIAL.

See CRIMINAL LAW, 2—LIBEL, 2—NEGLIGENCE, 1.

NEWSPAPER.*See* LIBEL.**NONREPAIR.***See* HIGHWAY.**NOTICE OF ALLOTMENT.***See* COMPANY, 1.**NOTICE OF ASSESSMENT.***See* MUNICIPAL CORPORATIONS, 4.**NOTICE OF ASSIGNMENT.***See* COMPANY, 3.**NOTICE OF MOTION.***See* MORTGAGE, 1—RAILWAY, 2.**NUISANCE.**

Abatement—Public Health Act, secs. 6, 81—Report of Provincial Board of Health—Determination of Question of Nuisance or no Nuisance—Application to Judge of Supreme Court of Ontario—Jurisdiction of Judge—Order Directing Abatement of Nuisance—Affidavits Supporting Report of Board — Inadmissibility — Affidavits in Answer—Weight of—Refusal of Judge to Grant Enlargement—Absence of Prejudice — Leave to Appeal — Judges' Orders Enforcement Act, sec. 4—Deposit of Garbage of City by Contractor on Land in Township —Complaint of Local Board of Health of Township—Contractor Agent or Servant of City Corporation, not Independent Contractor—Liability of Corporation, Contractor, and Land-owner — Time for Abatement — Extension of.

NUISANCE—(Continued.)

Re WATERLOO LOCAL BOARD OF HEALTH, CAMPBELL'S CASE, 338.

ONTARIO RAILWAY AND MUNICIPAL BOARD.

See MUNICIPAL CORPORATIONS, 6 — NEGLIGENCE, 1 — STREET RAILWAY, 1, 4.

ONTARIO TEMPERANCE ACT.

1. *Magistrate's Conviction for Offence against sec. 40—Having or Keeping Intoxicating Liquor on Premises for Sale, Barter, or other Disposal — Evidence — Admissibility—Native Wine Found on Premises — Onus — Sec. 88 — "Other Disposal"—Lawful Disposal — Amendment — Criminal Code, sec. 1124.*

REX V. NAZZARENO, 36.

2. *Magistrate's Conviction for Offence against sec. 40—Selling Intoxicating Liquor in Hotel—Evidence of Detectives or Spies—Participation in Offence—Necessity for Corroboration—Application of Rule as to Accomplices—Corroboration by Testimony of Defendant — Sufficiency of Evidence to Warrant Conviction—Appeal to District Court Judge—No New Evidence Taken—Conviction Quashed — Opinion of Judge as to Credibility of Witnesses, Formed in Previous Case —Further Appeal to Appellate Division—Conviction Restored—Evidence of Prior Conviction—Questions Put to Defendant on Cross-examination—Canada Evi-*

ONT. TEM. ACT—(Continued.)
dence Act, sec.12—Ontario Evidence Act, sec. 19 (1).

REX V. MCCRANOR, 482.

3. Shipment of Intoxicating Liquor from Quebec to Manitoba—Shipment as "Pickles"—Use of Names of Reputable Companies as Consignor and Consignee without their Knowledge—Seizure of Liquor en Route at Town in Ontario—Jurisdiction of Magistrate for Town to Order Confiscation—Motion to Quash Order—Locus Standi of Applicant—"Owner"—Intention to Violate Act—Onus—Liquor Found in Ontario—Sec. 70 (9) of Act.

Re ONTARIO TEMPERANCE ACT, RENAUD'S APPLICATION, 238.

ORDERS IN COUNCIL.

See ALIEN ENEMY—WATER.

PARENT AND CHILD.

See SEDUCTION.

PARK.

See WILL, 2.

PART PERFORMANCE.

See CONTRACT, 2.

PARTIES.

See RAILWAY, 2 — STREET RAILWAY, 2.

PASSENGER.

See HIGHWAY—STREET RAILWAY, 2.

PAYMENT.

See GUARANTY, 1.

PENALTY.

See STREET RAILWAY, 4.

PHOTOGRAPHS.

See COSTS, 2.

PLEADING.

See HUSBAND AND WIFE—MUNICIPAL CORPORATIONS, 1—NEGLIGENCE, 1.

POLICE MAGISTRATE.

See ONTARIO TEMPERANCE ACT.

POWER COMPANY.

See WATER.

POWER OF APPOINTMENT.

See VENDOR AND PURCHASER, 2.

POWER OF SALE.

See MORTGAGE, 2.

PRACTICE

See CONSPIRACY — COSTS — DISCOVERY—DIVISION COURTS — EXECUTION — HUSBAND AND WIFE—LIBEL, 1—MORTGAGE, 1 RAILWAY, 2—SOLICITOR—WRIT OF SUMMONS.

PRESCRIPTION.

See WATER.

PRESUMPTION.

See STREET RAILWAY, 4.

PRINCIPAL AND AGENT.

See HUSBAND AND WIFE—SALE OF GOODS.

PRINCIPAL AND SURETY.

See GUARANTY.

PRIORITIES.

See RAILWAY, 1.

PROBATE.*See* WILL.**PRODUCTION OF DOCUMENTS.***See* DISCOVERY.**PROGRESS CERTIFICATES.***See* RAILWAY, 2.**PROMISSORY NOTES.***See* HUSBAND AND WIFE.**PROPERTY PASSING.***See* CONTRACT, 4.**PROSPECTUS.***See* COMPANY, 1.**PROVINCIAL BOARD OF HEALTH.***See* CEMETERY—NUISANCE.**PROVINCIAL LEGISLATURE.***See* CONSTITUTIONAL LAW.**PROXIMATE CAUSE.***See* HIGHWAY—INSURANCE, 2
—STREET RAILWAY, 3.**PUBLIC HEALTH ACT.***See* NUISANCE.**PUBLIC PARK.***See* WILL, 2.**PUBLIC POLICY.***See* CEMETERY.**PUBLIC SCHOOLS.***See* MUNICIPAL CORPORATIONS,
5.**RAILWAY.**1. Bondholders — Mortgages —
Sale of Railway by Receiver —
Distribution of Fund Arising from**RAILWAY—(Continued.)***Proceeds of Sale — Conflicting
Claims — Priorities — Liens of
Bondholders — Claim to Liens by
Holders of Detached Coupons —
Transfer of Coupons — Effect of —
Purchase or Satisfaction — Preser-
vation of Lien — Exchange of
Bonds of First Issue for those of
Second Issue — Agreement for Ex-
change Procured by Misrepre-
sentation — Relief by Way of Re-
scission or Reinstatement — Case of
each Holder Requiring Separate
Proof — Operation of Mortgage up-
on Railway afterwards Acquired
by Railway Company — Rental —
Charge on Railway Lands — Dis-
charge by Payment out of Fund —
Costs.*TRUSTS AND GUARANTEE CO.
LIMITED v. GRAND VALLEY R.W.
Co., 398.2. Issue of Bonds — Payment of
Part of Issue Guaranteed by
Municipal Corporations under
Authority of By-laws Set out in
Schedule to 8 Edw. VII. ch. 135
(O.) — Mortgage Securing Bonds
Made by Railway Company to
Trustee — Confirmation by 9 Edw.
VII. ch. 139 (O.) — Sale of Bonds
by Trustee — Payments Made by
Trustee to Railway Company —
Construction of clause 3 of Mort-
gage-deed — Order of Court under
Rule 938 et seq. of Con. Rules of
1897 — Absence of Notice of
Motion — Effect of — Waiver — Om-
nia Præsumunter rite esse Acta —
Representation of Municipal Cor-
porations by one of four — Order
for — Rules 193, 200 — Jurisdic-
tion — Validity of Order — Binding
Effect upon all four Corporations

RAILWAY—*(Continued.)*

—*Payments Made upon Progress Certificates Issued by Engineer of Railway Company—Proportion of Guaranteed Bonds to Unguaranteed where Latter not Sold—Exhaustion of Fund—Percentage to be Retained—Payment on Pro Rata Basis—Duty of Trustee—Protection of Trustee by Exculpatory Provisions of Mortgage-deed—Acting in Good Faith and Honestly and Reasonably—Trustee Act, sec. 37—Advice of Court under sec. 66—Limitations Act, sec. 47—Interest on Proceeds of Sale of Unguaranteed Bonds—Beneficial Interest of Municipal Corporations under Mortgage-deed—Status as Plaintiffs in Action against Trustee.*

STOTHERS v. TORONTO GENERAL TRUSTS CORPORATION, 432.

See CONSTITUTIONAL LAW—
NEGLIGENCE, 2.

RATIFICATION.

See HUSBAND AND WIFE—
MUNICIPAL CORPORATIONS, 2.

RECEIVER.

See RAILWAY, 1.

RECTIFICATION OF DEED.

See VENDOR AND PURCHASER,
1.

RELEASE.

See CONTRACT, 2—GUARANTY,
1.

RELIGIOUS SOCIETY.

See CONSPIRACY.

RENEWAL OF LEASE.

See LANDLORD AND TENANT.

REPORT OF ENGINEER.

See MUNICIPAL CORPORATIONS,
2.

RESCISSION.

See COMPANY, 1—MORTGAGE,
1.

RESOLUTION OF COUNCIL.

See MUNICIPAL CORPORATIONS,
2, 5.

**REVOCATION OF LETTERS
PROBATE.**

See WILL, 1, 3.

REVOCATION OF LICENSE.

See CONTRACT, 2.

RIVER.

See WATER.

ROAD.

See HIGHWAY.

ROCK.

See CONTRACT, 1.

**ROMAN CATHOLIC EPISCO-
PAL CORPORATION.**

See CEMETERY—CONSPIRACY.

RULES.

(Consolidated Rules of the
Supreme Court of Judicature for
Ontario, 1897.)

Rules 120, 132, 193, 200, 356,
358, 524, 938-943: STOTHERS v.
TORONTO GENERAL TRUSTS COR-
PORATION, 432.

(Consolidated Rules of the
Supreme Court of Ontario, 1913.)

Rules 25-30: SUPERIOR COP-
PER CO. LIMITED v. PERRY AND
SUTTON, 24.

RULES—(Continued.)

Rule 134 (2): O'DELL v. TORONTO R.W. Co., 350.

Rule 183: WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS, 584.

Rule 217: COPELAND v. MERTON, 645.

Rule 330: BASIL v. SPRATT, 155.

Rule 350: MCCURDY v. OAK TIRE AND RUBBER CO. LIMITED, 235.

Rule 505 (1): COPELAND v. MERTON, 645.

Rule 507: FLEXLUME SIGN CO. LIMITED v. GLOBE SECURITIES Co., 277.

Rule 523: GRAINGER v. ORDER OF CANADIAN HOME CIRCLES, 53.

Rule 533: GRAINGER v. ORDER OF CANADIAN HOME CIRCLES, 53.

Rule of 24th December, 1913: NEWCOMBE v. EVANS, 628.

SALE OF GOODS.

Contract—Musical Instrument of Vendor's Manufacture — Agency of Vendor for Purpose of Selection of Particular Instrument—Revocation by Purchaser before Appropriation to Contract of Particular Instrument—Subsequent Appropriation by Vendor without Assent of Purchaser — Refusal of Purchaser to Accept—Vendor Limited to Damages for Breach of Executory Contract—Measure of Damages—Action for Price of Instrument Based on Special Contract—Failure to Recover because Legally Appropriated Article not Tendered.

SALE OF GOODS—(Continued.)

MASON & RISCH LIMITED v. CHRISTNER, 146.

See BILLS OF EXCHANGE—CONTRACT, 3, 4, 5.

SALE OF LAND.

See MORTGAGE, 2—VENDOR AND PURCHASER.

SALE OF RAILWAY.

See RAILWAY, 1.

SATISFACTION.

See RAILWAY, 1.

SCALE OF COSTS.

See SOLICITOR, 1.

SCHOOLS.

See MUNICIPAL CORPORATIONS, 5.

SEAL.

See CEMETERY—COMPANY, 2 —MUNICIPAL CORPORATIONS, 1.

SECURITIES.

See GUARANTY, 1.

SECURITY FOR COSTS.

See LIBEL, 1.

SEDUCTION.

Action by Mother for Seduction of Daughter—Death of Father before Seduction—Remarriage of Mother—Stepfather Living at Time of Seduction but Dying before Action—Cause of Action—Seduction Act, secs. 2, 3—Married Women's Property Act, sec. 4 (2)—Trustee Act, sec. 41.

STONER v. SKENE, 609.

SERVICE OF NOTICE OF MOTION.

See MORTGAGE, 1.

SERVICE OF NOTICE OF WRIT.

See WRIT OF SUMMONS.

SET-OFF.

See COMPANY, 3.

SEWER.

See MUNICIPAL CORPORATIONS, 3.

SHARES.

See BROKERS—COMPANY, 1—
WRIT OF SUMMONS.

SHORT FORMS OF CONVEYANCES ACT.

See VENDOR AND PURCHASER, 1.

SHORT FORMS OF MORTGAGES ACT.

See MORTGAGE, 2.

SNOW AND ICE.

See STREET RAILWAY, 1.

SOLICITOR.

1. *Bill of Costs—Action to Recover Amount of—Solicitors Act, R.S.O. 1914, ch. 159, sec. 34—Services Rendered by Plaintiff in Capacity of Solicitor—Reference for Taxation—Lump-sum Charged for Specific Items Set out in Bill—Compliance with Statute—Costs of Action and Appeal—Scale of Costs.*

LYNCH-STAUTON V. SOMERVILLE, 575.

2. *Order for Taxation of Itemised Bill of Costs—Lump-sum*

SOLICITOR—(Continued.)

Allowed by Taxing Officer—Reference back with Direction to Pass upon each Item—Non-tariff Items—Evidence.

Re SOLICITORS, 273.

SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER, 1.

SQUATTER.

See WATER.

STATED CASE.

See CRIMINAL LAW, 1.

STATUTE OF FRAUDS.

See CONTRACT, 2.

STATUTE OF LIMITATIONS.

See CONTRACT, 2—RAILWAY, 2—WILL, 2.

STATUTES.

32 Geo. III. ch. 60 (Imp.) (Fox's Libel Act): WILSON V. LONDON FREE PRESS PRINTING CO., 12.

7 Wm. IV. ch. 8 (U.C.) (Seduction Act): STONER V. SKENE, 609.

8 Vict. ch. 82 (Can.) (creating Bishop of Kingston a Corporation Sole): BASIL V. SPRATT, 155.

13 & 14 Vict. ch. 60 (Can.) (Libel and Slander), sec. 1: WILSON V. LONDON FREE PRESS PRINTING CO., 12.

C.S.U.C. 1859, ch. 67 (Cemetery Companies): HUBBS V. BLACK, 545.

30 & 31 Vict. ch. 3 (Imp.) (British North America Act), sec. 91 (10): SMITH V. ONTARIO AND MINNESOTA POWER CO. LIMITED, 43.

30 & 31 Vict. ch. 3 (Imp.), secs. 92 (14), 96: JOHNSON & CAREY CO. V. CANADIAN NORTHERN R.W. CO., 533.

30 & 31 Vict. ch. 3 (Imp.), sec. 96: Re TORONTO R.W. CO. AND CITY OF TORONTO, 381.

37 Vict. ch. 34 (Ontario Benevolent Societies Act): BASIL V. SPRATT, 155.

R.S.C. 1886, ch. 92 (Works Constructed in or over Navigable Waters),

STATUTES—(Continued.)

secs. 1-9: SMITH v. ONTARIO AND MINNESOTA POWER CO. LIMITED, 43.

R.S.O. 1887, ch. 184 (Municipal Act): SNOW v. CITY OF TORONTO, 623.

55 Vict. ch. 43 (O.) (amending Municipal Act), sec. 1: SNOW v. CITY OF TORONTO, 623.

55 Vict. ch. 99 (O.) (incorporating Toronto Railway Company), sched., cl. 36: O'DELL v. TORONTO R.W. CO., 350.

55 Vict. ch. 99 (O.) (incorporating Toronto Railway Company), secs. 1, 25: CITY OF TORONTO v. TORONTO R.W. CO., 308.

R.S.O. 1897, ch. 203 (Insurance Act), sec. 163 (5), (6): GRAINGER v. ORDER OF CANADIAN HOME CIRCLES, 53.

3 Edw. VII. ch. 15 (O.) (amending Insurance Act), sec. 8: GRAINGER v. ORDER OF CANADIAN HOME CIRCLES, 53.

3 Edw. VII. ch. 19 (O.) (Municipal Act), secs. 2 (8), 554: SNOW v. CITY OF TORONTO, 623.

3 Edw. VII. ch. 58 (D.) (Railway Act), sec. 180: WALSH v. INTERNATIONAL BRIDGE AND TERMINAL CO., 117.

4 & 5 Edw. VII. ch. 108 (D.) (International Bridge and Terminal Company): WALSH v. INTERNATIONAL BRIDGE AND TERMINAL CO., 117.

4 & 5 Edw. VII. ch. 139 (D.) (Ontario and Minnesota Power Company): SMITH v. ONTARIO AND MINNESOTA POWER CO. LIMITED, 43.

R.S.C. 1906, ch. 144 (Winding-up Act): *Re* BAILEY COBALT MINES LIMITED, BAILEY COBALT MINES LIMITED v. BENSON, 1.

R.S.C. 1906, ch. 145 (Evidence Act), sec. 12: REX v. McCRAVOR, 482.

R.S.C. 1906, ch. 146 (Criminal Code), secs. 269, 270: STOTHERS v. WORLD NEWSPAPER CO. LIMITED, 33.

R.S.C. 1906, ch. 146, sec. 1021: REX v. DI FRANCESCO, 75.

R.S.C. 1906, ch. 146, sec. 1124: REX v. NAZZARENO, 36.

6 Edw. VII. ch. 30 (Ontario Railway Act), sec. 162: STOTHERS v. TORONTO GENERAL TRUSTS CORPORATION, 432.

6 Edw. VII. ch. 31 (Ontario Railway and Municipal Board Act), sec. 63: CITY OF TORONTO v. TORONTO R.W. CO., 308.

6 Edw. VII. ch. 34 (O.) (Municipal Amendment Act, 1906), sec. 20: TEMISKAMING TELEPHONE CO. LIMITED v. TOWN OF COBALT, 366.

STATUTES—(Continued.)

6 Edw. VII. ch. 132 (O.) (Ontario and Minnesota Power Company): SMITH v. ONTARIO AND MINNESOTA POWER CO. LIMITED, 43.

8 Edw. VII. ch. 135 (O.) (Ontario West Shore Railway): STOTHERS v. TORONTO GENERAL TRUSTS CORPORATION, 432.

9 Edw. VII. ch. 139 (O.) (Ontario West Shore Railway): STOTHERS v. TORONTO GENERAL TRUSTS CORPORATION, 432.

1 & 2 Geo. V. ch. 22 (D.) (amending Railway Act), sec. 5: *Re* TORONTO R.W. CO. AND CITY OF TORONTO, 381.

3 Geo. V. ch. 135 (O.) (Ontario West Shore Railway): STOTHERS v. TORONTO GENERAL TRUSTS CORPORATION, 432.

R.S.O. 1914, ch. 40 (Highway Improvement Act), sec. 6: ANDERSON v. TOWNSHIPS OF ROCHESTER AND MERSEA, 301.

R.S.O. 1914, ch. 56 (Judicature Act), sec. 18: HICKMAN v. WARMAN, 257.

R.S.O. 1914, ch. 63 (Division Courts Act), sec. 62 (1): *Re* GLASS v. GLASS, 236.

R.S.O. 1914, ch. 71 (Libel and Slander Act), sec. 5: WILSON v. LONDON FREE PRESS PRINTING CO., 12.

R.S.O. 1914, ch. 71, sec. 12: STONE v. WORLD NEWSPAPER CO. LIMITED, 33.

R.S.O. 1914, ch. 72 (Seduction Act), secs. 2, 3: STONER v. SKENE, 609.

R.S.O. 1914, ch. 75 (Limitations Act): HUBBS v. BLACK, 545.

R.S.O. 1914, ch. 75, secs. 5, 6 (9): MATHESON v. TOWN OF MITCHELL, 619.

R.S.O. 1914, ch. 75, sec. 47: STOTHERS v. TORONTO GENERAL TRUSTS CORPORATION, 432.

R.S.O. 1914, ch. 76 (Evidence Act), sec. 19 (1): REX v. McCRAVOR, 482.

R.S.O. 1914, ch. 79 (Judges' Orders Enforcement Act), sec. 4: *Re* WATERLOO LOCAL BOARD OF HEALTH, CAMPBELL'S CASE, 338.

R.S.O. 1914, ch. 90 (Summary Convictions Act), sec. 4: REX v. NAZZARENO, 36.

R.S.O. 1914, ch. 102 (Statute of Frauds): HUBBS v. BLACK, 545.

R.S.O. 1914, ch. 109 (Conveyancing and Law of Property Act), sec. 24: *Re* SPELLMAN AND LITOVITZ, 30.

STATUTES—(Continued.)

R.S.O. 1914, ch. 115 (Short Forms of Conveyances Act): HICKMAN v. WARMAN, 257.

R.S.O. 1914, ch. 117 (Short Forms of Mortgages Act): HOEHN v. MARSHALL, 241.

R.S.O. 1914, ch. 121 (Trustee Act), secs. 37, 66: STOTHERS v. TORONTO GENERAL TRUSTS CORPORATION, 432.

R.S.O. 1914, ch. 121, sec. 41: STONER v. SKENE, 609.

R.S.O. 1914, ch. 140 (Mechanics and Wage-Earners Lien Act), secs. 12, 33, 49: JOHNSON & CAREY Co. v. CANADIAN NORTHERN R.W. Co., 533.

R.S.O. 1914, ch. 149 (Married Women's Property Act), sec. 4 (2): STONER v. SKENE, 609.

R.S.O. 1914, ch. 159 (Solicitors Act), sec. 34: LYNCH-STAUTON v. SOMERVILLE, 575.

R.S.O. 1914, ch. 178 (Companies Act), secs. 99, 101 (3): MCCURDY v. OAK TIRE AND RUBBER Co. LIMITED, 571.

R.S.O. 1914, ch. 178, sec. 151 (6), (7): SUPERIOR COPPER Co. LIMITED v. PERRY AND SUTTON, 24.

R.S.O. 1914, ch. 178, sec. 210: BASIL v. SPRATT, 155.

R.S.O. 1914, ch. 183 (Ontario Insurance Act), secs. 194 (condition 3), 198: STADDON v. LIVERPOOL-MANITOBA ASSURANCE Co., 355.

R.S.O. 1914, ch. 185 (Ontario Railway Act), secs. 131, 260a: *Re* TORONTO R.W. Co. and CITY of TORONTO, 381.

R.S.O. 1914, ch. 185, sec. 260: CITY of TORONTO v. TORONTO R.W. Co., 308.

R.S.O. 1914, ch. 186 (Ontario Railway and Municipal Board Act): O'DELL v. TORONTO R.W. Co., 350.

R.S.O. 1914, ch. 186, secs. 4 (2), 5 (1) and (4), 15 (1), 25, 31, 33, 34, 38, 44, 48 (8) (b), 54: *Re* TORONTO R.W. Co. and CITY of TORONTO, 381.

R.S.O. 1914, ch. 186, secs. 21, 22: CITY of TORONTO v. TORONTO R.W. Co., 308.

R.S.O. 1914, ch. 192 (Municipal Act), secs. 249, 460 (1): WITHERSPOON v. TOWNSHIP of EAST WILLIAMS, 584.

R.S.O. 1914, ch. 192, sec. 398 (10): BURLINGTON PUBLIC SCHOOL BOARD v. TOWN of BURLINGTON, 561.

R.S.O. 1914, ch. 192, sec. 401 (13): *Re* BUTTERWORTH AND CITY of OTTAWA, 84.

R.S.O. 1914, ch. 193 (Local Improvement Act), secs. 9, 11, 36 (1), (2): FLEMING v. TOWN of SANDWICH, 514.

STATUTES—(Continued.)

R.S.O. 1914, ch. 198 (Municipal Drainage Act): ANDERSON v. TOWNSHIPS of ROCHESTER AND MERSEA, 301.

R.S.O. 1914, ch. 198, secs. 75, 77: *Re* LABUTE AND TOWNSHIP of TILBURY NORTH, 522.

R.S.O. 1914, ch. 207 (Motor Vehicles Act), sec. 23: ANDERSON v. TOWNSHIPS of ROCHESTER AND MERSEA, 301.

R.S.O. 1914, ch. 218 (Public Health Act), secs. 6, 81: *Re* WATERLOO LOCAL BOARD of HEALTH, CAMPBELL'S CASE, 338.

R.S.O. 1914, ch. 261 (Cemetery Act), sec. 37: TOWN of EASTVIEW v. ROMAN CATHOLIC EPISCOPAL CORPORATION of OTTAWA, 284.

R.S.O. 1914, ch. 266 (Public Schools Act), sec. 43: BURLINGTON PUBLIC SCHOOL BOARD v. TOWN of BURLINGTON, 561.

5 Geo. V. ch. 22 (O.) (Mortgagors and Purchasers Relief Act), secs. 2 (2), 5 (2): COPELAND v. MERTON, 645.

5 Geo. V. ch. 30 (O.) (amending Insurance Act): GRAINGER v. ORDER of CANADIAN HOME CIRCLES, 53.

6 Geo. V. 30 (O.) (amending Mechanics and Wage-Earners Lien Act), sec. 1: JOHNSON & CAREY Co. v. CANADIAN NORTHERN R.W. Co., 533.

6 Geo. V. ch. 35 (O.) (amending Companies Act), sec. 6: BASIL v. SPRATT, 155.

6 Geo. V. ch. 50 (Ontario Temperance Act), sec. 40: REX v. McCANOR, 482.

6 Geo. V. 50, secs. 40, 44, 88, 92 (9): REX v. NAZZARENO, 36.

6 Geo. V. ch. 50, sec. 70 (9): *Re* ONTARIO TEMPERANCE ACT, RENAUD'S APPLICATION, 238.

7 Geo. V. ch. 92 (O.) (Toronto Railway Company), sec. 17: *Re* TORONTO R.W. Co. and CITY of TORONTO, 381.

7 Geo. V. ch. 99 (O.) (Order of Canadian Home Circles): GRAINGER v. ORDER of CANADIAN HOME CIRCLES, 53.

8 Geo. V. ch. 20 (O.) (amending Companies Act), sec. 30: SUPERIOR COPPER Co. LIMITED v. PERRY AND SUTTON, 24.

8 Geo. V. ch. 30 (amending Ontario Railway Act), sec. 4: *Re* TORONTO R.W. Co. and CITY of TORONTO, 381.

8 Geo. V. ch. 32 (O.) (amending Municipal Act), sec. 8: *Re* BUTTERWORTH AND CITY of OTTAWA, 84.

STEPFATHER.

See SEDUCTION.

STIFLING PROSECUTION.

See HUSBAND AND WIFE.

STREET.

See MUNICIPAL CORPORATIONS,
4—TELEPHONE COMPANY.

STREET RAILWAY.

1. *Agreement with City Corporation—Removal of Snow and Ice from Streets—Conditions 21 and 22—55 Vict. ch. 99, sec. 25 (O.)—Construction—Action by City Corporation to Recover Damages for Failure to Remove Snow and Ice—Jurisdiction of Court—Exclusive Jurisdiction of Ontario Railway and Municipal Board—Secs. 21 and 22 of Ontario Railway and Municipal Board Act—Sec. 260 of Ontario Railway Act—Damages—Reference.*

CITY OF TORONTO V. TORONTO R.W. CO., 308.

2. *Injury to Passenger—Fall Caused by Breaking of Strap—Negligence—Admission of Primâ Facie Case—Finding of Jury that Admitted Negligence was Cause of Injury—Evidence of Care in Selection—Contention that Primâ Facie Case Displaced—Absence of Evidence of Inspection—Cause of Breakage not Proved—Damages—Husband of Injured Passenger Joined as Co-plaintiff—Bills for Medical Attendance and Nurses Included in Sum Assessed by Jury—Dismissal of Action as against Husband—Costs.*

BRAWLEY V. TORONTO R.W. CO., 568.

ST. RAILWAY—(Continued).

3. *Injury to Person in Highway by outward Swing of Rear Steps of Car—Negligence—Proximate Cause of Injury—Liability.*

BARR V. TORONTO R.W. CO. AND CITY OF TORONTO, 232.

4. *Penalty for Non-compliance with Order of Ontario Railway and Municipal Board—Confirmation of Order by 7 Geo. V. ch. 92, sec. 17—Failure to Furnish and Operate Additional Cars within Time Fixed by Order—Power to Impose Penalty Given by sec. 260a of Ontario Railway Act (8 Geo. V. ch. 30, sec. 4)—Failure to Excuse Non-compliance—Finding of Board—Appeal—Neglect to Apply to Rescind Order or Extend Time—Ontario Railway and Municipal Board Act, secs. 25, 42—Enforcing Compliance with Previous Order—Lapse of Time Fixed by Previous Order—Validity of Order of Board—Presumption of Validity of Appointment of de Facto Members—Appointment by Lieutenant-Governor or Governor - General—British North America Act, sec. 96—Status of de Facto Member—Right to Question in Collateral Proceeding—Proceeding by Quo Warranto Information—Jurisdiction—"Court"—"Superior Court"—Powers and Duties of Board, Administrative and Judicial—Statutory Provisions.*

Re TORONTO R.W. CO. AND CITY OF TORONTO, 381.

See NEGLIGENCE, 1.

**SUBMISSION OF QUESTION
TO ELECTORS.**

See MUNICIPAL CORPORATIONS,
5.

SUICIDE.

See LIBEL, 1.

**SUPERINTENDENCE OF
COURT.**

See WILL, 2.

SUPPLEMENTARY ORDER.

See EXECUTION.

SURETY.

See GUARANTY.

TAILINGS.

See LAND.

TARIFF OF COSTS.

See COSTS—SOLICITOR.

TAXATION OF COSTS.

See COSTS—SOLICITOR.

TELEPHONE COMPANY.

*Right to Maintain Poles and
Wires in Streets of Town—Powers
Given by Letters Patent Incor-
porating Company—Consent of
Town Corporation to Exercise of
Powers—Agreement Authorised by
By-law of Town Council—Powers
of Council—Municipal Amend-
ment Act of 1906, 6 Edw. VII. ch.
34, sec. 20—Construction of Agree-
ment—Absence of Limitation as to
Time—"Term"—"Franchise."*

TEMISKAMING TELEPHONE CO.
LIMITED V. TOWN OF COBALT,
366.

TEMPERANCE.

See ONTARIO TEMPERANCE
ACT.

TENDER.

See SALE OF GOODS.

**TESTAMENTARY
CAPACITY**

See WILL, 1, 3.

THREATS.

See HUSBAND AND WIFE.

TIME.

See NUISANCE—STREET RAIL-
WAY, 4—TELEPHONE COMPANY.

TITLE TO LAND.

See VENDOR AND PURCHASER,
2.

TREATY.

See WATER.

TRESPASS.

See CONTRACT, 2 — NEGLI-
GENCE, 2.—WATER.

TRIAL.

See CONSTITUTIONAL LAW—
COSTS, 1, 2—CRIMINAL LAW, 2—
WRIT OF SUMMONS.

TRUSTEE ACT.

See RAILWAY, 2—SEDUCTION.

TRUSTS AND TRUSTEES.

See RAILWAY, 2.

UNDUE INFLUENCE.

See HUSBAND AND WIFE—
WILL, 1.

URBAN MUNICIPALITIES.

See MUNICIPAL CORPORATIONS,
5, 6.

USE AND OCCUPATION.

See LANDLORD AND TENANT.

VENDOR AND PURCHASER.

1. *Agreement for Sale of House and Lot Described by Street Number—Conveyance by Deed under Short Forms of Conveyances Act—Land Conveyed as West Half of Lot according to Plan—House Encroaching 4 Feet on East Half—Mutual Mistake—Rectification of Deed—Impossibility of, because Title to East Half in Stranger—Damages in Lieu of Specific Performance—Judicature Act, sec. 18—Intention of Purchaser—Admissibility of Oral Evidence of Circumstances—Breach of Covenant for Right to Convey—Assessment of Damages—Cost of Removal of House.*

HICKMAN v. WARMAN, 257.

2. *Agreement for Sale of Land—Objections to Title—Power of Appointment—Validity of Execution—Conveyancing and Law of Property Act, sec. 24—Discharge of Mortgage Made to Executors—Necessity for Execution by All—Special Power Given to Majority.*

Re SPELLMAN AND LITOVITZ, 30.

VERDICT.

See CRIMINAL LAW, 2—LIBEL, 2.

VIS MAJOR.

See WATER.

WAIVER.

See RAILWAY, 2.

WATER.

Erection by Power Company of Dam in Navigable River—Flooding of Lands above Dam—Trespass—Ashburton Treaty of 1842,

WATER—(Continued.)

art. II. — Provision for Open Water Communication—Damage Complained of not Arising from Interference with Right of Passage—Abrogation of Treaty by Arrangement between Canada and United States—Approval of Works by Order of Governor-General in Council—Special Act, 4 & 5 Edw. VII. ch. 139 (D.)—General Act respecting Works Constructed in or over Navigable Waters, R.S.C. 1886, ch. 92, secs. 1-9—Advantage of Navigation—Validity of Order in Council—Representation as to Statutory Charge of Compensation for Damage to Lands—Condition or Limitation of Powers—Obligation to Make Compensation—Cause of Flooding—Actus Dei or Vis Major—Claims of Squatters upon Crown Lands—Agreement between Crown and Company—Right to Flood Lands—Claims of Owners of Lands—Prescription—Flooding in Part Caused by Dam—Assessment of Damages for Part of Injury—Absence of Negligence.

SMITH v. ONTARIO AND MINNESOTA POWER CO. LIMITED, 43.

WAY.

See HIGHWAY.

WEIGHTS AND MEASURES.

See MUNICIPAL CORPORATIONS, 6.

WILL.

1. *Action to Set aside Letters Probate—Evidence—Onus—Testamentary Capacity—Undue Influence—Finding of Trial Judge—Reversal on Appeal.*

GALLAGHER v. WOODMAN, 98.

WILL—(Continued.)

2. Devise of Lands to Town Corporation for Public Park—Acceptance on Conditions of Will—Condition that Park to be Kept in Proper Order and Repair—Breach—Action for Mandatory Order to Compel Corporation to Perform Condition—Obligation to Superintend Performance not Assumed by Court—Forfeiture for Breach—Claim for Declaration—Continuous Breach Beginning more than 10 Years before Action—Limitations Act, R.S.O. 1914, ch. 75, secs. 5, 6 (9).

MATHESON V. TOWN OF MITCHELL, 619.

3. Testamentary Incapacity—Testator Incapable at Time of Instructions of Remembering Relations with Claims upon his Bounty—Stupor and Mental Inertia—Will Executed three Days after Instructions and one Day before Death—Destruction of Mentality by Disease—Revocation of Probate—Finding of Want of Capacity—Result of.

FAULKNER V. FAULKNER, 634.

4. Two Testamentary Documents Executed by Testatrix in Existence at Death—Alterations Made in Earlier Document after Execution without Re-execution—Reference in Later Document to Earlier one—"If the Stroked one Stands Take it"—Later Document alone Admitted to Probate.

GRANT V. GRANT, 143.

WINDING-UP.

See COMPANY, 3.

WITNESSES.

See CONTRACT, 3—COSTS, 2—CRIMINAL LAW, 2—ONTARIO TEMPERANCE ACT, 2.

WORK AND LABOUR.

See CONTRACT, 1.

WORDS.

"A1 Shape Mechanically:" HALL MOTORS LIMITED V. F. ROGERS & Co., 327.

"About:" SUSMAN V. BAKER, 39.

"Approximate:" SUSMAN V. BAKER, 39.

"Borrowing Stock:" JARVIS V. CONNELL, 264.

"Closing out:" JARVIS V. CONNELL, 264.

"Conditions:" SUPERIOR COPPER CO. LIMITED V. PERRY AND SUTTON, 24.

"Counsel Fee at Trial:" FLEXLUME SIGN CO. LIMITED V. GLOBE SECURITIES Co., 277.

"Court:" Re TORONTO R.W. Co. AND CITY OF TORONTO, 381.

"Easement:" SNOW V. CITY OF TORONTO, 623.

"Finally Disposes of the Whole or Part of the Action or Matter:" FLEXLUME SIGN CO. LIMITED V. GLOBE SECURITIES Co., 277.

"Franchise:" TEMISKAMING TELEPHONE CO. LIMITED V. TOWN OF COBALT, 366.

"If the Stroked one Stands Take it:" GRANT V. GRANT, 143.

"Involve a Criminal Charge:" STONE V. WORLD NEWSPAPER Co. LIMITED, 33.

"Marking up:" JARVIS V. CONNELL, 264.

WORDS—(Continued.)

"More or Less:" BOSTON LAW BOOK CO. V. CANADA LAW BOOK CO. LIMITED, 529.

"Other Disposal:" REX V. NAZZARENO, 36.

"Owner:" Re ONTARIO TEMPERANCE ACT, RENAUD'S APPLICATION, 238.

"Prospectus:" McCURDY V. OAK TIRE AND RUBBER CO. LIMITED, 571.

"Real Matter in Dispute:" WITHERSPOON V. TOWNSHIP OF EAST WILLIAMS, 584.

"Rock:" MILLS V. CONTINENTAL BAG AND PAPER CO., 71.

"Superior Court:" Re TORONTO R.W. CO. AND CITY OF TORONTO, 381.

"Term:" TEMISKAMING TELEPHONE CO. LIMITED V. TOWN OF COBALT, 366.

"Whether she Remains a Widow or has Married again:" STONER V. SKENE, 609.

WORDS—(Continued.)

"With the Approval of the Municipal Board:" Re BUTTERWORTH AND CITY OF OTTAWA, 84.

WRIT OF SUMMONS.

Foreign Defendants—Service of Notice of Writ out of Ontario—Ontario Companies Act, sec. 151, sub-secs. 6 and 7, Added by 8 Geo. V. ch. 20, sec. 30 — Action by Mining Company—Enforcement of Call on Shares—"Conditions" of Service—Rules 25-30—Validity of Call—Application of New Sub-sections — Special Act, 7 Edw. VII. ch. 117 —Validity of Call—General Statutory Powers—Question for Trial—Jurisdiction of Court—Leave to Enter Conditional Appearance.

SUPERIOR COPPER CO. LIMITED V. PERRY AND SUTTON, 24.

See MORTGAGE, 1.

